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No. 736

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

J. WEINGARTEN, INC., *Petitioner,*

v.

THE FEDERAL TRADE COMMISSION, PAUL RAND DIXON, *Chairman,* PHILIP ELMAN, *Member,* A. EVERETTE MACINTYRE, *Member,* JOHN R. REILLY, *Member,* MARY GARDINER JONES, *Member,* WALTER R. JOHNSON, *Hearing Examiner,* ERNEST D. OAKLAND, *Complaint Counsel*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

J. Weingarten, Inc., a corporation, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this cause on September 14, 1964.

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* The substitution of Commissioners Reilly and Jones for Commissioners Sigurd Anderson and A. Leon Higginbotham, Jr., two of the original parties, reflects recent changes in the composition of the Commission. (Rule 48(3))

OPINIONS BELOW

The opinions of the District Court for the Eastern District of Texas (App. A, *infra*, pp. 19a-46a)[1] are not officially reported but are unofficially reported at 1963 Trade Cas. ¶70,790 (oral opinion) and 70,845 (written findings of fact and conclusions of law). The opinion of the court of appeals (App. A, pp. 1a-18a) is reported at 336 F. 2d 687.

JURISDICTION

The judgment of the court of appeals which is here sought to be reviewed was entered on September 14, 1964. The jurisdiction of this Court is invoked under Title 28, U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Trade Commission violated Sections 5(c), 7, and 12 of the Administrative Procedure Act, 5 U.S.C. §§ 1004(c), 1006, and 1011, thereby depriving petitioner of its fundamental right to a fair hearing, by prejudging the issues in the case and directing that the hearing examiner find that petitioner had violated Section 5 of the Federal Trade Commission Act.

2. Whether the Commission violated the requirement of Section 6(a) of the Administrative Procedure Act, 5 U.S.C. § 1005(a), that it proceed with "reasonable dispatch," by remanding an administrative proceeding that had been pending before it for a period of eight years (five years of investigation and three years of litigation) for retrial to implement an arbitrary prejudgment.

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[1] Herein, "App." refers to Appendix; "R." to certified record; and "S.R." to certified supplemental record.

3. Whether the court of appeals had jurisdiction to consider the appeal from the district court in view of the fact that the Commission, in compliance with the district court's order, dismissed its complaint, thus mooting the ultimate issue on appeal.

STATUTES INVOLVED

The statutes involved are reproduced in Appendix B, pp. 65a-67a.

STATEMENT

Petitioner, J. Weingarten, Inc., is a corporation organized and existing under the laws of the State of Texas with its principal office at 600 Lockwood Drive, Houston, Texas. It is a retail grocery chain doing business in the Eastern District of Texas with stores located in Texas, Louisiana, and Tennessee.

After prolonged investigation commencing in 1955, the Commission issued its complaint on January 5, 1960, charging that petitioner had violated Section 5 of the Federal Trade Commission Act[2] by knowingly inducing and receiving discriminatory allowances from suppliers which it knew were illegal under Section 2(d) of the Clayton Act. It was further alleged that seven specified suppliers did not make such allowances available on proportionally equal terms to their other customers competing with Weingarten.

Beginning on June 30, 1960, administrative hearings were held before a hearing examiner during the course of which trial counsel for the Commission introduced

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[2] In pertinent part Section 5 provides: "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful."

oral testimony of numerous witnesses and many documentary exhibits. Following the closing of the record on May 29, 1961, both sides filed extensive briefs, proposed findings of fact and conclusions of law; and the hearing examiner heard oral arguments. In its proposed findings and conclusions petitioner urged, among other things, that Commission counsel had failed to prove the essential fact of violation that other customers of the same suppliers, who competed with petitioner in the sale of the same goods, had not received or been offered similar allowances. At no time did Commission counsel seek permission to adduce additional evidence on this or any other issue in the case; nor did they ever contend that there was any further evidence which could or should be adduced.

On May 1, 1962, the hearing examiner issued his initial decision in which he concluded that petitioner had knowingly induced and received promotional allowances in violation of the Federal Trade Commission Act. Petitioner immediately appealed this determination to the full Commission.

Eleven months later, on March 25, 1963, the Commission issued its order and opinion in which it reversed the hearing examiner and held, after a "review of all of the evidence," that its trial counsel had failed to establish the elements of the alleged violation. As for petitioner's contention that there has been a failure of proof on the critical issue of whether other customers of its suppliers competed with Weingarten, the Commission stated that Weingarten ". . . contends that this meager showing was not made in this record and, upon review of all of the evidence, we must conclude that it is right." But instead of dismissing the complaint, the Commission remanded the case to the hearing

examiner for the taking of further evidence, commenting that proof sufficient to establish the violation "should not be difficult to adduce." (App. A, p. 53a)

In the course of its remand opinion, the Commission said:

> "This case . . . is fraught with a great deal of public interest, for its successful prosecution may affect the cessation of a whole series of law violations [by third persons not parties to this proceeding]" (App. A, p. 49a);
>
> * * *
>
> "These witnesses [10 witnesses from alleged competitors] were probably in command of the facts needed to satisfy this criteria but the examination by counsel failed to elicit them." (App. A, pp. 53a-54a);
>
> * * *
>
> "While the Commission is sympathetic to the proposition that voluntary cooperative retail groups of the type here involved are entitled to the protection of the Act, we are faced in this instance with a dearth of factual information upon which to predicate a finding that the sponsoring wholesalers and their affiliate groups were, or were not, 'customers' [within the meaning of the Act] of their suppliers." (App. A, p. 56a);
>
> * * *
>
> "This matter has now been in litigation for slightly more than three years and both the public and the respondent have incurred substantial expense in its trial." (App. A, p. 58a);
>
> "As we stated earlier, this case is attended with a great deal of public interest and to now order dismissal for failure of proof . . . would waste all of the money and effort heretofore expended." (App. A, p. 58a);
>
> * * *

> "There is no question but that the public interest cannot be permitted to suffer because of the mistakes of Commission personnel." (App. A, p. 58a);
>
> * * *
>
> "It is not contemplated that more than five full hearing days for each side will be needed to adequately *shore up* this record although the Commission sees no need to actually order a limitation on the length of the hearings." (Emphasis added) (App. A, p. 59a).

On April 29, 1963, petitioner filed in the district court the instant complaint for declaratory judgment and injunctive relief on the grounds that the Commission's remand order was motivated by prejudgment of the issues and was in violation of Section 6(a) of the Administrative Procedure Act requiring federal agencies to "proceed with reasonable dispatch to conclude any matter presented to it . . . "[3]

The Commission, in response, filed on May 3, 1963, a motion to dismiss or in the alternative for summary judgment. After further pleadings and hearing, the district court denied the Commission's motion and granted the basic relief requested by petitioner.

The district court held that the Commission had failed to act with reasonable dispatch in violation of the Administrative Procedure Act by remanding the complaint to the hearing examiner for "a retrial of once-litigated issues." (App. A, p. 41a) The court noted that the order of remand was made "after the matter had been under consideration by the Commission for some 8 years—5 years of investigation and 3

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[3] 5 U.S.C. § 1005(a).

years of litigation" (App. A, p. 33a), that "there is no basis in the record for the suggestion that facts sufficient to make a case against plaintiff [Weingarten] should have been available to government counsel, nor is it reasonable to conclude that such facts could be made available at this late date" (App. A, p. 37a), that "there is very little likelihood of success to the extent of finding testimony that would establish a complaint against Weingarten" (App. A, pp. 40a-41a), and that "there is no assurance how long it would actually take to perfect the hearing, under the order of remand" (App. A, p. 41a).

On the question of prejudgment, the district court found "that the Commission's remand was made for the purpose of finding evidence detrimental to Weingarten," that the court could not "help but feel that the Commission was somewhat displeased, to put it as an understatement, in not being able to find sufficient evidence or substantial evidence to justify the charges, and to support the Hearing Examiner's original decision" and that "the facts in this particular case show some evidence of unfairness on the part of the Commission, and some bias and prejudice which sheds some light upon the Commission's action in remanding this case." (App. A, p. 33a)

The district court concluded that unless the Commission was restrained from proceeding according to the plan announced in its opinion and order of remand, petitioner would be irreparably injured (a) because of lack of opportunity to challenge the remand "if hearings are held," (b) because court review of proceedings under Section 5 of the Federal Trade Commission Act is available only after "the damage is done and the violations of the . . . [petitioner's] rights, as alleged

herein, have prevailed and had their full force and effect," and (c) because the remand could serve as an additional delay and there is "no assurance how long it would actually take to perfect the hearing, under the order of remand." (App. A, p. 43a)

The district court's order did not prohibit the holding of further proceedings by the Commission but only prohibited remand to the hearing examiner. Further, the court did not direct the Commission to enter any particular type of final order. It did direct that "within ninety (90) days from May 15, 1963, defendant Federal Trade Commission . . . make and issue a final order, disposing of said case before the Federal Trade Commission." (App. A, p. 46a)

On July 24, 1963, the Commission filed its notice of appeal to the court of appeals. The next day it filed motions with the court of appeals requesting a stay of the district court's order and expedition of the appeal. The court of appeals declined to grant the requested stay, and on August 13, 1963, the Commission dismissed its complaint against petitioner.

On appeal the court of appeals reversed the decision of the district court and remanded the case with directions to the district court to dissolve the injunction issued by that court. This petition seeks review of that decision and order.

The district court's jurisdiction was based upon Section 10 of the Administrative Procedure Act, 5 U.S.C. § 1009, and Section 1 of the Declaratory Judgment Act, 28 U.S.C. § 2201.

REASONS FOR GRANTING THE WRIT

I.

Prejudice in the administrative process has become a serious problem. Every litigant is entitled to a hearing "by a tribunal free from bias and prejudice and imbued with the desire to accord to the parties equal consideration,"[4] but the Federal Trade Commission in this case, in substance, directed the hearing examiner to reopen the case for further evidence and then find petitioner guilty. This direction to the hearing examiner was made in the face of a record, 8 years in the making, which admittedly did not establish any violation of law. In exhibiting prejudice and bias in its order of remand, the Commission below clearly violated Sections 5(c), 7(a) and (b), and 12 of the Administrative Procedure Act.[5]

The Commission's prejudgment of this case is manifested throughout its opinion accompanying the remand. The district court holding on this point was

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[4] *Inland Steel Co.* v. *NLRB*, 109 F.2d 9, 20 (7th Cir. 1940); see also *Morgan* v. *United States*, 304 U.S. 1, 14-15 (1938); *Railroad Comm'n of Cal.* v. *Pacific Gas & Elec. Co.*, 302 U.S. 388, 393 (1938); *Ohio Bell Tel. Co.* v. *Public Utilities Comm'n*, 301 U.S. 292, 304-05 (1937).

[5] Section 7(a) of the Administrative Procedure Act provides that "The functions of all presiding officers and of officers participating in decisions . . . shall be conducted in an impartial manner." The right and duty of the examiner to decide a case free from the arbitrary dictates of others is also made manifest by the provisions of Section 5(c) regulating the examiner's conduct (5 U.S.C. § 1004(c)) and by the provisions of Section 7(b) outlining the substantial powers granted to the examiner in the conduct of hearings (5 U.S.C. § 1006(b)). Section 12 provides that ". . . all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons." (5 U.S.C. § 1011)

based upon specific findings of fact, but the court of appeals disregarded those findings without determining that they were "clearly erroneous"[6] and reversed the district court.

Basic tenets of the Administrative Procedure Act have almost been ignored by federal agencies and courts alike. Although the district court's decision here was based solely on the provisions of that Act, the court of appeals barely paid lip service to its provisions. It is now time, we submit, for this Court to breathe life into this important statute which unfortunately has become almost moribund through disuse and lack of enforcement. As stated by this Court in one of the first cases interpreting the Administrative Procedure Act, ". . . it would be a disservice to our form of government and to the administrative process itself if the Court should fail, so far as the terms of the Act warrant, to give effect to its remedial purposes where the evils it was aimed at appear." *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 41 (1950).

One of the fundamental purposes of the Act was "to curtail and change the practice of embodying in one person or agency the duties of prosecutor and judge" (*Ibid.*). To remedy this problem the Act provided for *independent* hearing examiners. As stated in an early report on the Act:

> "Creation of independent hearing commissioners *insulated from all phases of a case other than*

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[6] The findings of a trial court "shall not be set aside unless clearly erroneous . . . ." Rule 52(a), Fed. R. Civ. Proc. Where an appellate court is charged with the responsibility of reviewing the lower court's findings to determine whether they are clearly erroneous, yet leaves the findings of the lower court undisturbed, the Supreme Court will accept the findings of the trier of fact. See *NLRB* v. *Washington Aluminum Co.*, 370 U.S. 9, 15 (1962).

> *hearing and deciding* will, the Commission believes, go far toward solving this problem at the level of the initial hearing provided the proper safeguards are established to assure the insulation.'"[7] Emphasis added)

Despite the clear mandate of the Act, the court of appeals below disregarded the findings of prejudgment by the district court and held that the Commission, without censure, may tell its hearing examiner that there is evidence of a party's guilt, that such evidence can be easily adduced, and that the public interest requires issuance of an order against the party. In short, the Commission directed the examiner to adjudge petitioner guilty. To uphold such a decision would render the requirements of the Administrative Procedure Act a nullity, and persons appearing before administrative agencies under such conditions would be denied a fair hearing before an impartial trier of the facts.

The biased attitude of the Commission in this case is demonstrated by its criticism of its own staff counsel's so-called "mistakes" in failing to convict petitioner.[8] Further, the Commission clearly evidenced prejudgment when it stated that the "successful prosecution [of petitioner] may affect the cessation of a whole series of law violations" and thus make it unnecessary for the Commission to expend time and money "to bring complaints against each supplier suspected of granting a discriminatory promotional

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[7] Administrative Procedure in Government Agencies (Rep. Atty. Gen. Comm. Admin. Proc.) 56 (1941), S. Doc. No. 8, 77th Cong. 1st Sess. 56 (1941); quoted by Court, *id.* at 44.

[8] "There is no question but that the public interest cannot be permitted to suffer because of the mistakes of Commission personnel." (App. A, p. 58a; footnote omitted.)

allowance to [Weingarten]" (App. A, p. 49a); that the Commission in this case *"is sympathetic to the proposition* [of Commission counsel] that voluntary cooperative retail groups of the type here involved are entitled to the protection of the Act" (App. A, p. 56a, emphasis added); and that the Commission's sympathy can result in conviction of petitioner if Commission counsel will make a "more detailed showing as to the operations of the [voluntary cooperative retail] groups, particularly with respect to their dependence upon the participating wholesalers" (App. A, 56a).

In so giving the examiner a blueprint for conviction, the Commission abandoned the role of judge for that of prosecutor. Reviewing courts have condemned administrative officials who overstep the line that divides judging from prosecuting. In *NLRB* v. *Phelps,* 136 F. 2d 562, 567 (5th Cir. 1943), the court stated:

> "Such an attitude, excusable if not commendable in a prosecutor, is a wholly improper one in a judge or an examiner who sits in judicial place to hear and determine facts, draw conclusions of law and make reports and recommendations based thereon."

Indeed, so jealously does our law regard the right to a fair trial before an impartial tribunal that not only must the trial in fact be fair and impartial, but there must be no "appearance" of unfairness or partiality. In *In Re Murchison,* 349 U.S. 133, 136 (1955), this Court held that not only is actual fairness required, "but our system of law has always endeavored to prevent even the probability of unfairness." In further comment, this Court stated:

> "Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice

> equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice'. Offutt v. United States, 348 U.S. 11, [14 (1954)]."[9]

Apart from conflicting with the decisional law and the requirements of the Administrative Procedure Act,[10] the decision of the court below is also contrary to the recent holding of the Court of Appeals for the District of Columbia in *Texaco, Inc.* v. *Federal Trade Commission*, 336 F. 2d 754 (D.C. Cir. 1964). In that case, the reviewing court set aside an order because the Chairman of the Federal Trade Commission had in a public speech manifested prejudgment of a party's guilt. The court of appeals held that "a disinterested reader of Chairman Dixon's speech could hardly fail to conclude that he had in some measure decided in advance that Texaco had violated the Act." (*Id.* at 760) Such prejudgment, the court held, "amounted in the circumstances to a denial of due process which invalidated the order under review." (*Ibid.*)[11]

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[9] See also *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954).

[10] In the instant case, the court of appeals below also erred by ignoring the well-established requirement that administrative agencies are under a stricter standard with respect to a fair and impartial hearing than are others because many of the normal procedural safeguards are not available in agency proceedings. *Ohio Bell Tel. Co.* v. *Public Utilities Comm'n*, 301 U.S. 292, 304-05 (1937); *NLRB* v. *National Paper Co.*, 216 F.2d 859, 868-69 (5th Cir. 1954).

[11] On October 28, 1964, the government filed a petition for a writ of certiorari but it did not seek review of the ruling on prejudgment. See *Federal Trade Commission* v. *Texaco, Inc. and the B. F. Goodrich Co.*, No. 635. Subsequently, on October 29, 1964, Chairman Dixon disqualified himself in five other cases pending before the Federal Trade Commisison, since the companies in those cases were also discussed in the same speech involved in the *Texaco* case. See *In Re Pure Oil Co.*, F.T.C. Docket No. 6640.

The increased frequency of cases of bias and prejudgment by administrative officials reveals that authority is being exercised with no clear understanding of the separate roles of judge and prosecutor. The lines between these two functions have become blurred.[12] In this case the Commission, perhaps without deliberate realization, assumes the function of prosecutor. In sanctioning such prejudgment, the court of appeals below disregarded the requirements of the Administrative Procedure Act and due process of law. Its decision further conflicts with other courts of appeals decisions on what constitutes prejudice in administrative action.

We submit that because of the ever-growing seriousness of the problem of prejudgment by administrative officials and the conflict in decisions, a review of this case should be granted.

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[12] The need for clarifying standards to root out the evil of prejudice in administrative proceedings has been acknowledged by one member of the Federal Trade Commission. In remarks before the Federal Bar Association on September 11, 1964, Commissioner Elman stated: "Improvements of the fairness of agency adjudication will not come until agency members frankly acknowledge, and conscientiously seek to avoid, the dangers inherent in the fusion of functions with the administrative process." (Speech, p. 8)

See also this Court's statement in *Morgan* v. *United States*, 304 U.S. 1, 22 (1938): "The maintenance of proper standards on the part of administrative agencies in the performance of their quasi-judicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority. On the contrary, it is in their manifest interest. For, as we said at the outset, if these multiplyng agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play."

II.

"There can be little doubt that the protracted delays accompanying agency adjudications constitute a serious and notorious shortcoming in administrative procedure."[13]

Because it was universally recognized that excessive delay was a characteristic of administrative proceedings, Congress provided in Section 6(a) of the Administrative Procedure Act that "Every agency shall proceed with reasonable dispatch to conclude any matter presented to it . . ." (5 U.S.C. § 1005(a)) and provided further in Section 10(e) that the district court may "compel agency action unlawfully withheld or unreasonably delayed" (5 U.S.C. § 1009(e)).[14]

Notwithstanding this, the court of appeals below said:

> "But we think it would be the extremely rare case where a Court would be justified in holding . . . that the passage of time and nothing more presents an occasion for the peremptory intervention of an outside Court in the conduct of an agency's adjudicative proceedings." (App. A, pp. 7a-8a)

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[13] Montgomery, *Administrative Discovery*, 16 Stanford Law Review 1061, July 1964; see also Fascell, *Complexities and Delays in Administrative Procedures Must Be Eliminated*, 46 A.B.A.J. 49 (1960); Long, *Administrative Proceedings: Their Time and Cost Can Be Cut Down*, 49 A.B.A.J. 833 (1963); Landis, *Report on Regulatory Agencies to the President-Elect*, Sub-Comm. on Administrative Practice and Procedure, Senate Comm. on the Judiciary, 86th Cong., 2d Sess., Report (Comm. Print 1960); Prettyman, *Reducing the Delay in Administrative Hearings: Suggestions for Officers and Counsel*, 39 A.B.A.J. 966 (1953).

[14] Section 2(g) defines "agency action" to include "failure to act" (5 U.S.C. § 1001(g)).

Of course there was "something more" here. The additional delay, created by the remand, was for the sole purpose of implementing an arbitrary prejudgment of a law violation.

The opinion of the district court relied to a great extent upon its finding that the Commission violated Section 6(a) in ordering a useless remand. It is undisputed that the Commission spent five years investigating petitioner's activities and another three years actually litigating the question of whether petitioner had violated the law. At the end of this eight year period, the Commission finally concluded that there was no record evidence upon which petitioner could be found to have violated Section 5. It nevertheless ordered further proceedings in the case although, as later found by the district court, the Commission had no evidentiary basis for such a remand. (App. A, pp. 37a, 40a-41a, 42a-43a)

The district court found, and this finding was left undisturbed by the court of appeals, that there is no evidence from which it may be concluded that the deficiencies in proof noted by the Commission in its opinion of March 25, 1963, can be easily remedied or that any evidence exists which Commission counsel might have used to show a violation of the Federal Trade Commission Act by petitioner. (App. A, p. 37a)

In reversing the district court, the court of appeals so construed Section 6(a) as to deprive it of its vitality to correct the abuses of delay. If its interpretation prevails, parties to proceedings before administrative agencies will be subject to unreasonable delay and harassing tactics which, in the long run, can serve only to weaken respect for the administrative process and

justify further dilatory techniques on the part of agency staff personnel.

Moreover, the construction given by the court below to Section 6(a) conflicts with the holding of the Fourth Circuit in *Deering Milliken, Inc.* v. *Johnston*, 295 F. 2d 856 (4th Cir. 1961), that courts have a duty of enforcing the statutory requirement that administrative agencies proceed with "reasonable dispatch." In that case, the reviewing court upheld the grant of injunctive relief where an agency remanded a case for retrial of litigated issues in the absence of a showing that there was newly discovered evidence or other good cause for the failure to adduce the evidence during the original hearings. Although the court was not there concerned with an abusive command to find a violation as in the instant case, it did point out that a respondent in an administrative proceeding cannot be required to participate in "supplemental hearings which are repetitive, purposeless, and oppressive . . . ." (*Id.* at 868)

III.

That part of the court of appeals' decision holding that the dismissal of the complaint by the Commission on August 13, 1963, did not make the matter moot conflicts with prior decisions of this Court.

Fundamental to the whole judicial process is the *absolute* requirement that a court have jurisdiction over the parties and subject matter before it can legitimately render its judgment thereon. Further, one can proceed in a federal court only when there is a "case" or "controversy." U. S. Const. Art. III, § 2. Yet the court of appeals here heard an appeal and assumed

jurisdiction of a cause which had already become moot by reason of the dismissal of the complaint.

The court of appeals' entire discussion of this issue follows (App. A, p. 18a):

> "In light of the foregoing, it is apparent that the injunction must be dissolved.[27] That means, of course, that the Commission is free to reinstate the case on its docket and proceed pursuant to the remand.
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> [27] The conditional nature of the Commission's dismissal of the proceedings makes inapposite the authorities cited by Weingarten in support of the contention that the matter is now moot."

It is submitted that the court erred in assuming that the Commission's dismissal was conditional in nature and in ignoring a long line of authority from this Court holding that a court is deprived of jurisdiction upon performance of the act to which the moving party has contended it is entitled.

The district court's order stated, in pertinent part (App. A, p. 46a):

> "Within ninety (90) days from May 15, 1963, defendant Federal Trade Commission and . . . [other named defendants] make and issue a *final order, disposing of said case before the Federal Trade Commission.*" (Emphasis added)

On August 13, 1963, the 90th day following the district court's order, the Commission issued an order of dismissal with an accompanying opinion. The opinion recited facts surrounding the prosecution of the complaint and the issuance of the district court's order of July 11, 1963. (App. A, p. 62a-64a) It also stated that the order of dismissal was entered "solely for the purpose of *complying with the* above-noted *order of*

the District Court." (App. A, p. 64a; emphasis supplied) Thereupon the Commission entered the following order:

> "IT IS ORDERED that the Commission's complaint in this proceeding be, and it hereby is, dismissed without prejudice to the right of the Commission to reopen the matter and take such further action therein as the public interest may require if the aforesaid order of the District Court becomes ineffective as a matter of law." (App. A, p. 64a)

The court of appeals assumed that since the Commission had reserved the right to "reopen" the case under certain circumstances, it had not in fact dismissed the administrative complaint. If, however, the Commission was in fact complying with the order of the district court, as it stated it was doing, its order of dismissal was "a final order, disposing of . . . [the Weingarten case] before the Federal Trade Commission." (App. A, p. 64a) It hardly seems open to question that the Commission unconditionally dismissed the complaint; the language in the Commission order with respect to possible *reopening* is surplusage.

In determining what the Commission actually did on August 13, 1963, with respect to the complaint, it is helpful to note its own language to the court of appeals with respect to what it would have to do if a stay of the district court's order were not granted. In its motion requesting such a stay pending appeal (filed with the court of appeals on July 29, 1963), the Commission stated that it would suffer "irreparable injury" if the stay were not granted (S.R. 4) and that "the district court has entered an injunction order which, if not stayed, will render the issues moot prior to the time in which an appeal proceeding can properly be decided by this Court" (S.R. 12), and, further,

"without *pendente lite* relief the Commission will be forced to take affirmative action that will result either in the final dismissal of an action that it had instituted or the issuance of an order upon a record as to which the Commission has raised questions. *The damage to be done will be irreparable.*" (S.R. 13; emphasis supplied) Later in the same motion, the Commission recognized that the district court ordered the Commission to "make a 'final order, disposing of said case' before the Commission. This order will disturb, rather than maintain the status quo, by requiring the Commission to dispose of the subject matter of the litigation. *In addition, such an order would grant relief which is final or ultimate in nature.*" (S.R. 25; emphasis supplied) The Department of Justice and the Commission further advised the court of appeals by telegram on August 13, 1963, that

> "We respectfully urge that if the District Court's order is not stayed today, the appellants may choose only to finally dispose of the administrative proceedings referred to in the District Court order or face the possibility of a contempt charge." (S.R. 137)

The fact that the Commission's order was issued in compliance with a court order does not affect the finality of the Commission's action.[15] This same issue arose

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[15] In this connection, it must be pointed out that the district court's order did not direct the Commission to find in favor of Weingarten but allowed the agency to "take such action as they wish and deem advisable to take in regard to finally disposing of this matter, consistent with said opinion, these findings and conclusions, and the Order herein entered." (App. A, p. 44a)

Under these circumstances, the Commission was not required to *dismiss* the complaint; other alternatives were open to it. Thus, by dismissing the complaint, it is assumed that the Commission intended to terminate the litigation.

in *Brownlow* v. *Schwartz*, 261 U.S. 216 (1923), where this Court stated, *id.* at 218:

> "It is urged that the permit was issued by the inspector of buildings only because he believed it was incumbent upon him to comply with the judgment of the court of appeals and avoid even the appearance of disobeying it. The motive of the officer, so far as this question is concerned, is quite immaterial. We are interested only in the indisputable fact that his action, however induced, has left nothing to litigate .... The case being moot, further proceedings upon the merits can neither be had here nor in the court of first instance."[16]

It is well settled that "where it appears upon appeal that the controversy has become entirely moot, it is the duty of the appellate court to set aside the decree below and remand the case with directions to dismiss." *Duke Power Co.* v. *Greenwood County*, 299 U.S. 259, 267 (1936).[17] The court below ignored this controlling principle of law.

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[16] Accord, *e.g.*, *Oil Workers Unions* v. *Missouri*, 361 U.S. 363 (1960); *American Book Co.* v. *Kansas ex rel. Nichols*, 193 U.S. 49 (1904).

[17] Accord, *e.g.*, *United States* v. *Anchor Coal Co.*, 279 U.S. 812 (1929); *Atherton Mills* v. *Johnston*, 259 U.S. 13, 16 (1922); *Heitmuller* v. *Stokes*, 256 U.S. 359 (1921).

CONCLUSION

This case presents important questions in the enforcement of the provisions of the Administrative Procedure Act which guarantee due process in administrative proceedings. In addition, the decision of the court of appeals below conflicts with the District of Columbia Circuit's opinion in *Texaco, Inc.* v. *Federal Trade Commission, supra,* the Fourth Circuit's opinion in *Deering Milliken Co.* v. *Johnston, supra,* and this Court's opinion in *Brownlow* v. *Schwartz, supra.* Accordingly, it is submitted that the petition should be granted.

Respectfully submitted,

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APPENDIX A

Opinions Below

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20732

THE FEDERAL TRADE COMMISSION, ET AL., *Appellants,*

versus

J. WEINGARTEN, INC., *Appellee.*

Appeal from the United States District Court for the Eastern District of Texas.

(September 14, 1964.)

Before BROWN, WISDOM and BELL, Circuit Judges.

BROWN, Circuit Judge: The question here is whether the District Court sitting in Texas erred in enjoining proceedings taking place in Washington, D.C. pursuant to a remand order of the Federal Trade Commission. This presents questions of jurisdiction and, assuming jurisdiction, whether an injunction was proper in light of the facts of this particular case.

Sometime in 1955, the Commission began an investigation relating, among other things, to a possible violation by Weingarten of §5 of the Federal Trade Commission Act.[1] The investigation culminated in the filing on January 5, 1960, of a complaint alleging that Weingarten had violated §5 by the inducement or receipt of promotional allowances from suppliers which it knew were granted in violation of §2(d) of the Clayton Act,[2] because the allowances had not been made available on proportionally equal terms to competitors of Weingarten selling the suppliers' products.[3] On the same day, the Commission instituted proceedings against eight suppliers who were alleged to have given the unlawful allow-

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[1] 15 USCA § 45. Subsection (a)(1), 15 USCA § 45(a)(1) provides:

> "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful."

[2] 15 USCA § 13(d) provides:

> "It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities."

[3] The complaint also charged a further violation of receiving the promotional allowances and converting them to its own use rather than expending them in advertising and promotion of the suppliers' goods. This charge was dismissed by the Hearing Examiner and Complaint Counsel did not appeal to the Commission. This matter is consequently no longer involved in the administrative proceedings.

ances to Weingarten.[4] After what all concede were the usual administrative preliminaries, hearings on the Weingarten complaint began on June 30, 1960.[5] After full hearings terminating in the spring of 1961, the parties filed briefs, proposed findings of fact and conclusions of law, and presented oral argument to the Hearing Examiner.

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[4] Assigned to the same Hearing Examiner before whom the Weingarten complaint had been docketed, these supplier proceedings are in the following various stages of litigation before the Commission and the Courts:

Supplier	FTC Docket Number	Status
Ipswich Hosiery Co.	7715	Did not seek review of cease and desist order.
Yakima Fruit & Cold Storage Co.	7718	Did not seek review of cease and desist order.
Vanity Fair Mills, Inc.	7720	Cease and desist order sustained by 2 Cir., 1962, 311 F. 2d 480.
Shulton, Inc.	7721	Remanded for taking of evidence on § 2(b) defense 7 Cir., 1962, 305 F. 2d 36.
Shreveport Macaroni Mfg. Co.	7719	Cease and desist order sustained by 5 Cir., 1963, 321 F. 2d 404.
Max Factor & Co.	7717	Dismissed, 33 U.S.L. Week 2068, July 22, 1964.
Nestle-Le Mur Co.	7716	Administrative proceedings suspended awaiting outcome in *Factor* and *Shulton*.
Lanolin Plus, Inc.	7722	Administrative proceedings suspended awaiting outcome in *Factor* and *Shulton*.

[5] Apparently this was the date on which the taking of testimony actually began. Preliminary proceedings starting on March 17, 1960, brought on an interlocutory appeal by Weingarten to the Commission on March 23, 1960. This appeal was disposed of by the Commission on September 9, 1960.

On May 1, 1962, the Examiner issued his initial decision finding that the charge against Weingarten here involved had been established.[6] Weingarten gave notice on May 22 of its intention to appeal the initial decision to the Commission, and after extensions of time for filing briefs had been granted to both Weingarten and Complaint Counsel, the matter was submitted on oral argument on October 23, 1962. Five months later, on March 25, 1962, the Commission entered the order enjoined by the District Court which remanded the case for further, but limited, hearing before the Examiner.

The gist of the Commission's opinion and order of March 25 was that the initial decision could not stand because of certain defects in proof and certain procedural defects in the fact findings of the Examiner's initial decision.

The District Judge held that by virtue of the remand, the Commission had violated the command of §6(a) of the Administrative Procedure Act[7] to "proceed with reasonable dispatch to conclude any matter presented to it." Consequently he enjoined the Commission and the Hearing Examiner from proceeding with the remand. He did not tell the Commission what disposition to make of the Weingarten complaint, but he did order that the Commission dispose of it on its own with no remand to an Examiner, and that it be finally disposed of within 30 days. Its motion for stay pending appeal having been denied, the Commission dismissed the complaint without prejudice to its being reopened in the event the litigation in this Court was concluded in its favor.

I.

The Commission contends at the outset that the District Court was without jurisdiction to interfere with the orderly

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[6] As we indicate, note 3, supra, another charge was dismissed by the Examiner and is not here involved.

[7] 5 USCA § 1005(a).

course of the administrative proceedings.[8] Urging that the statutory appeal to the Court of Appeals provided in §5(c)[9] of the Federal Trade Commission Act is exclusive,[10] the Commission asserts that it constitutes a plain, speedy,

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[8] The Commission cites in this connection FTC v. Claire Furnace Co., 1927, 274 U.S. 160, 47 S. Ct. 553, 71 L. Ed. 978; Miles Laboratories v. FTC, D.C. Cir., 1944, 140 F. 2d 683; McFadden Publications, Inc. v. FTC, D.C. Cir., 1930, 37 F. 2d 822; Royal Baking Powder Co. v. FTC, D.C. Cir., 1929, 32 F. 2d 966.

[9] Section 5 of the Federal Trade Commission Act, 15 USCA § 45, provides:

"(a)(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce are hereby declared unlawful.

"• • •

"(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the circuit court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. • • • Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the Commission until the filing of the record and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. • • •.

"• • •

"(d) Upon the filing of the record with it the jurisdiction of the court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive."

[10] The Commission relies on Aircraft & Diesel Equip. Corp. v. Hirsch, 1947, 331 U.S. 752, ... S. Ct. ...., 91 L. Ed. 1796; FPC v. Arkansas Power & Light, 1947, 330 U.S. 802, 67 S. Ct. 1493, 91 L. Ed. 1261; Far Eastern Conference v. United States, 1952, 342 U.S. 570, 72 S. Ct. 492, 96 L. Ed. 576.

and adequate remedy at law which bars an injunction suit.[11] Weingarten, on the other hand, contends that the remedy provided by §5(c) is inadequate to protect its right to a disposition with reasonable dispatch and that jurisdiction was properly invoked pursuant to decisions like *Leedom* v. *Kyne*, 1958, 358 U.S. 184, 79 S.Ct. 180, 3 L.Ed.2d 210; *McCulloch* v. *Sociedad Nacional*, 1963, 362 U.S. 10, 83 S.Ct. 671, 9 L.Ed.2d 547; *Amos Treat & Co.* v. *SEC*, D.C. Cir., 1962, 306 F.2d 260; and *Deering Milliken, Inc.* v. *Johnston*, 4 Cir., 1961, 295 F.2d 856.

Although we recognize that the grant of jurisdiction in *Leedom*-type cases is a narrow one, *Boire* v. *Greyhound Corp.*, 1964, ... U.S. ...., ... S.Ct. ...., 11 L.Ed.2d 849, 854, we think we should not express any opinion in this area of jurisdiction when it is not necessary to a disposition of the case. Assuming, without deciding, that the District Court had jurisdiction to enjoin the remand proceedings, we conclude that the order did not violate the command of §6(a) to proceed with reasonable dispatch, nor were the proceedings otherwise defective as claimed. Consequently, the District Court erroneously enjoined the Commission and its staff from preceding under it.

II.

Weingarten builds its argument that §6(a) has been violated by charging (1) that the Commission is guilty of unexcused delay in the disposition of the administrative proceedings and (2) that the remand was an attempt by a biased Commission to implement an arbitrary prejudgment that Weingarten had violated the Act.

With respect to delay, Weingarten's claim rests on the simple contention that as a matter of law the Commission

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[11] FTC v. Claire Furnace Co., 1927, 274 U.S. 160, 47 S. Ct. 553, 71 L. Ed. 978; Royal Baking Powder Co. v. FTC, D.C. Cir., 1929, 32 F. 2d 966.

is not proceeding with dispatch when a complaint pends for some 2 and 1/2 years before a Hearing Examiner and 11 months thereafter before the whole Commission. Absent proof of the normal time necessary to dispose of a similar proceeding or of facts tending to show a dilatory attitude on the part of the Commission or its staff—matters totally undeveloped on this record—we are unable to say that a Judge can so hold. So far as this record shows, this case not only proceeded at a rate comparable to that normally experienced in cases of its kind, it also proceeded at a rate satisfactory to Weingarten. This record is barren of any suggestion that Weingarten at any time between January 5, 1960, the date the Complaint was filed, and March 25, 1963, the date the Commission entered its order of remand, ever complained about the pace of the proceedings. The record does reveal that extensions of time for filing briefs before the full Commission were granted to both Weingarten and the Complaint Counsel, and doubtless other extensions at other stages were granted to both parties.

Of course the Supreme Court and all Courts in a supervisory role are concerned with delay. It has recently had occasion to deplore the "nigh interminable" delay in connection with some administrative agency proceedings. *FPC* v. *Hunt*, 1964, ... U.S. ...., ... S.Ct. ...., 11 L.Ed.2d 878, 886. And we are the first to emphasize that agencies must exert the greatest resourceful, imaginative ingenuity in devising procedures which in a day of ever-expanding dockets will permit the regulatory process to function properly with reasonable dispatch. *Hill* v. *FPC*, 5 Cir., 1964, ... F.2d .... [Nos. 20375, 20386, *July 23*, 1964]. But we think it would be the extremely rare case where a Court would be justified in holding—as Weingarten urges us to do here—that the passage of time and nothing more presents an occasion for the peremptory intervention

of an outside[12] Court in the conduct of an agency's adjudicative proceedings. This is certainly not such a case, and the decision of the District Judge, insofar as it rests on this foundation, is clearly wrong and cannot stand.[13]

The other contention with respect to the asserted denial of the §6(a) right to a disposition with reasonable dispatch must be considered in light of the Commission's established power of remand for further hearing before an examiner. Weingarten concedes, as it must, that the Commission has the power to remand a case for the taking of additional evidence.[14] But, says Weingarten, the Commis-

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[12] We say "outside" court in the sense of one not in the direct chain of appellate review. See note 9, supra.

[13] What we say here in no way vitiates our holding in Atlantic & Gulf Stevedores, Inc. v. Donovan, 5 Cir., 1960, 274 F. 2d 794, 802. When an administrative officer or agency refuses to set the process in motion at all, entirely different considerations are present.

[14] The Third Circuit only recently approved a *sua sponte* remand by the Commission for the taking of additional evidence. Scott Paper Co. v. FTC, 3 Cir., 1962, 301 F. 2d 579, 584, approving Procter & Gamble Co., 1961, 3 CCH Trade Reg. Rep. (1961 Trade Cases) par. 15,425. The power of remand was recognized in Texaco, Inc. v. FTC, D.D.C., 1962, 1962 Trade Cases par. 70,382, stay pending appeal denied, D.C. Cir., 1962, 1962 Trade Cases par. 70,383. The remand power is conferred by § 8 of the Administrative Procedure Act, 5 USCA § 1007, Attorney General's Manual on the Administrative Procedure Act 84-85, and is expressly recognized in the Commission's Rules of Practice 4.19(d)(1), (2); 4.22(a), 16 C.F.R. §§ 4.19(d)(1), (2); 4.22(a). Certainly the Commission's obligation to protect the public interest, P. Lorillard Co. v. FTC, 4 Cir., 1950, 186 F. 2d 52, 55, forms a basis for the exercise of the remand power, and Courts remand matters to the Commission under similar circumstances as a matter of course. E.g., Scott Paper Co. v. FTC, 3 Cir., 1962, 301 F. 2d 579. In one of the related supplier cases, see note 4, supra, the Court remanded to allow the respondent to develop evidence of a defense. Shulton, Inc. v. FTC, 7 Cir., 1962, 305 F. 2d 36. Finally, the discretion of the Commission to regulate its affairs is doubtless no less than that affirmatively held to have been conferred on the NLRB in Deering Milliken, Inc. v. Johnston, 4 Cir., 1961, 295 F. 2d 856, 868.

sion violates the command of §6(a) because its purpose in the subsequent proceedings is to implement the Commission's arbitrary prejudgment of Weingarten's guilt even though the proceeding to adjudge that, legally and factually, has not yet been concluded.

The basis of the charge is this. The Commission, with candor, held in its March 25, 1963, order that it could not enter a cease and desist order against Weingarten on the administrative record as then developed. The reasons were two-fold. First, the Commission agreed with Weingarten that the record did not then contain evidence qualitatively sufficient to establish that at the time of the solicitation and receipt by Weingarten of promotional allowances from the suppliers, other customers of such supplier were competing with Weingarten in the distribution of goods of like grade and quality sold by such supplier. Second, the Commission found that the initial decision of the Hearing Examiner did not conform to the requirement of both the Administrative Procedure Act and the Commission's Rules that the reasons or basis for findings and conclusions upon all material issues of fact, law or discretion presented on the record be stated.[15]

Noting that Weingarten did not question that element [1] of the violation[16] was made out, the Commission made this observation about element [2]:

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[15] Administrative Procedure Act § 8(b), 5 USCA § 1007(b); FTC Rules of Practice § 4.19(b), 16 C.F.R. § 4.19(b).

[16] The gist of the violation here charged is that Weingarten violated § 5 of the Federal Trade Commission Act by the knowing receipt or inducement of a promotional allowance violative of § 2(d) of the Clayton Act as amended by the Robinson Patman Act. The Courts have uniformly endorsed this formulation by the Commission of the controlling legal principle. Grand Union Co. v. FTC, 2 Cir., 1962, 300 F. 2d 92; American News Co. v. FTC, 2 Cir., 1962, 300 F. 2d 104; Giant Foods, Inc. v. FTC, D.C. Cir., 1962, 307 F. 2d 184. In the Commission's words, the basic

> "Proof sufficient to establish the second criteria should not be difficult to adduce, since it involves merely a showing of the exact identity of the products purchased by the respondent from a supplier who granted it an allegedly discriminatory promotional allowance and the same showing for any of respondent's competitors who did not receive the allowance."

The Commission then remarked that the 10 witnesses relied upon by Complaint Counsel to prove this element of the case[17] "were probably in command of the facts needed to satisfy this criteria but the examination by counsel failed to elicit them."

At this point, the Commission presented detailed examples by way of illustration of "the defects in the evidence." Organizing the examples into distinct categories

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factual elements of the offense are (we have enclosed the numbers in [ ] for ease of reference):

"[1]. The solicitation and receipt by respondent in commerce of payments for promotional services in connection with the resale of a supplier's product.

"[2]. That at approximately the time of the solicitation and receipt, other customers of the supplier were competing with the recipient in the distribution of the grantor-supplier's goods of like grade and quality.

"[3]. The payments received by respondent were not affirmatively offered by the suppliers to such competing customers on proportionally equal terms.

"[4]. That respondent possessed information sufficient to put upon it the duty of making inquiry to ascertain whether the granting suppliers were making such payments available to its competitors on proportionally equal terms."

[17] The 10 witnesses were employees or officers of retailers or wholesalers distributing goods in one or more trade areas served by Weingarten.

of retailer[18] and wholesaler[19] testimony, the Commission found a number of things which made the testimony of these witnesses inadequate on which to then base a conclusion. After reviewing this evidence, the Commission concluded that although "a good deal of reliable and important information was secured from the ten 'competitor' witnesses," the evidence was not then sufficient on which to base a conclusion as to element [2]. Observing that a "definitive finding" on elements [3] and [4][20] could not

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[18] As respects retailer witnesses, the Commission observed failure to develop the form of business organization utilized by certain retail units, the exact capacity or position occupied by the witness with the organization, the specific products of suppliers granting allowances to Weingarten purchased and resold by allegedly competitive retail units during the relevant 1958 and 1959 periods, the volume of such products purchased and resold, whether such products were stocked in all stores of the retail unit, and if not, the identity of the stores stocking such products.

[19] With respect to the wholesaler testimony, these witnesses were apparently all officials of food wholesaling concerns which conducted a substantial part of their business with voluntary groups of cooperating retailers who trade under the same name and purchase the bulk of their supplies from the particular wholesalers. Complaint Counsel contended that these groups should be considered as a competitive unit as to Weingarten in the distribution of goods. As to this testimony, the Commission noted that it did not reveal the portion of the wholesalers' purchases from allegedly discriminating suppliers which were resold to retailers which did not belong to the cooperative group, did not show whether suppliers considered the retailer-wholesale cooperatives as a unit and normally paid promotional allowances to them as a unit, failed to show in sufficient detail the operation of the groups particularly with respect to their dependence on the participating wholesalers, and did not identify the particular member stores in competition with Weingarten or in instances where stores were shown to compete failed to show that these stores handled and sold items similar in grade and quality to those purchased by Weingarten from suppliers who granted it an allegedly discriminatory promotional allowance.

[20] The elements are detailed note 16, supra.

be made until element [2] was resolved, the Commission deferred consideration of these matters.

Expressly recognizing that a "remand of a case to a hearing examiner for further proceedings is never lightly ordered," the Commission proceeded to state its justification for the action being taken.

> "This matter has now been in litigation for slightly more than three years and both the public and respondent have incurred substantial expense in its trial. As we stated earlier, this case is attended with a great deal of public interest[21] and to now order dismissal for failure of proof without finally deciding the legality or illegality of the respondent's acts would waste all of the money and effort heretofore expended. This would be a disservice both to the respondent and to the public and cannot be seriously contemplated. There is no question but that the public interest cannot be permitted to suffer because of the mistakes of Commission personnel."

The Commission concludes that the remand "does not envision a complete retrial of all of the issues involved in [the] proceeding." It confined the hearing on remand to receipt of evidence "pertaining to questions which [the] opinion points out cannot be decided on the present record,"

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[21] The public interest referred to here by the Commission is developed at an earlier point in its opinion. Basically, the Commission position is that it has two methods of attacking what it apprehends is a knowing inducement of promotional allowances violative of § 2(d) of the Clayton Act. It may proceed against the alleged inducing customer as it did here or it may bring complaints against each supplier thought to be granting a discriminatory promotional allowance. The latter approach would, in the Commission's words, ordinarily "result in a myriad number of suits with attendant expense." Whereas a "successful prosecution [of the customer] may effect the cessation of a whole series of law violations."

and suggests that not "more than five full hearing days for each side will be needed to adequately shore up [the] record." It then suggested that the hearing "be concluded with dispatch and * * * [ordered] that the hearing examiner and the parties make every effort to complete the reception of evidence within 90 days."[22]

To this Weingarten responds that the language of the opinion, the uncertainty of Complaint Counsel and the Hearing Examiner as to how to proceed on remand, and the alleged inability of Complaint Counsel to adduce the evidence required by the Commission's opinion demonstrate that the remand is purely and simply the attempt of a biased Commission to effectuate the prejudgment of Weingarten's guilt.

Weingarten attempts to demonstrate prejudgment by quoting excerpts such as "proof to establish the second criteria should not be difficult to adduce," "these witnesses [10 'competitor' witnesses] were probably in command of the facts needed to satisfy this criteria but the examination of counsel failed to elicit them," the "public interest should not be permitted to suffer because of mistakes of Commission personnel," not "more than five full hearing days for each side will be needed to adequately shore up this record," and the like.

Weingarten then tries to build a structure of prejudgment out of the colloquy between the Examiner and Counsel on the initial exploratory conference after the remand order.

Finally, Weingarten suggests that if the evidence was not uncovered by the five years of investigation and three

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[22] The balance of the Commission's opinion is devoted to demonstrating the formal deficiencies in the initial decision. No complaint is here made by either party of the Commission's action in this respect, and in such ominous silence we express no opinion as to its correctness.

years of trial by experienced counsel, it does not exist. Support for this proposition is generated, says Weingarten, by the fact that the Commission did not take the evidence itself, rather than remanding to the Hearing Examiner.

In our view, none of these factors, whether considered singly or in the aggregate, demonstrate the alleged prejudgment. The Commission opinion, taken as a whole represented a proper adjustment of the rights of the public and Weingarten. It was not prejudgment at that stage for the Commission to indicate some likely, even though tentative views. For example, there was no real question about the solicitation and receipt of allowances by Weingarten. This, of course, is not unlawful. But the record also revealed that business organizations which operated or supplied two or more retail outlets had purchased goods from the same suppliers without receiving allowances. With the record in this stage of development, the Commission's action shows no prejudgment. On the contrary, it shows the Commission's careful regard for the protection of the rights of both Weingarten and the public in its insistence on evidence which not only pointed the finger accusingly at the respondent, but qualitatively afforded a reliable basis for a final adjudication:

> "Antitrust cases and, in particular, Robinson-Patman cases require a meticulous attention to minute details. When dealing with prices, allowances and goods of like grade and quality, the Commission may not indulge in assumptions or presumptions, for these matters are susceptible of exact proof and this is the type of showing which must be made. The evidence adduced in this record in support of the element under consideration is, of course, not totally lacking in probative value, for a good deal of reliable and important information was secured from the ten 'competitor' witnesses. But the evidence does not quite reach the level

of reliability and substantiality necessary for a concrete finding on this particular point."

The Commission's analysis of the deficiencies of this testimony, notes 18 and 19, *supra,* reflects that there was good basis for the conclusion that the evidentiary details thought desirable to give complete trustworthiness to the testimony would be readily forthcoming, probably from these very witnesses themselves. If not, it seems plain to us that apart from mechanical difficulties, there could hardly be any real problem in getting data as to exact sales and purchases, item by item, made by these suppliers and competitors.

Under such circumstances, what is a Commission charged by statute with the serious responsibility of effectuating statutory policy to do? Must it, on the one hand, in the face of a record indicating substantial basis for a likely finding of statutory transgressions, simply acquiesce in a default, largely for technical, not substantive, deficiencies? Or must it, out of some supposed attitude of administrative advocacy, press on, leaving the respondent to its appeal to the Court of Appeals, whose dockets are already overcrowed without adding as grist to the judicial mill deficiencies which the administrative body is perfectly willing procedurally to correct? *Cf. McDowell* v. *Celebrezze,* 5 Cir., 1962, 310 F.2d 43, 44.

If—and fortunately the if does not exist—due process is measured by mere externals, there might be some concern that a tribunal had "prejudged" by making a tentative, though uncertain, judgment. But in the light of actions by Courts, it would be a strange thing for Courts to censure administrative agencies for doing what Courts often do. Thus, for example, under *Bryan* v. *United States,* 1950, 338 U.S. 552, 70 S.Ct. 317, 94 L.Ed. 335, and cases such as our own *Gulf Oil Corp.* v. *Wright,* 5 Cir., 1956, 236 F.2d 46, we frequently remand both criminal and civil

cases for a full or partial retrail. Such situations are, in effect, a holding that while the evidence was legally deficient, nevertheless the record indicates that more or better evidence is available on a new or further trial and a system of justice dedicated to the objective of finding the truth ought not to balk at affording an opportunity of "shoring up" the case. That the Examiner expressed some quandary is of no moment. Doubtless many times both the District Judge and the lawyers are uncertain whether in remands we meant what we said or said what we meant.[23] But no one has yet argued that merely because the exact nature of the proceeding on remand is left to the rather loosely confined discretion of the District Judge in light of what in some cases may arguably be unhelpful direction from an appellate court, the remand is itself somehow defective. That is in essence what Weingarten urges here, and it is plain that we do not agree.

Actually the District Judge, by permitting the Commission itself to take action within 30 days, recognized that it was proper for the Commission to obtain additional or clarifying evidence. But this prohibition on the use of an Examiner is an unwarranted intrusion into the administrative process by a Judge. Unlike traditional court proceedings which have a constitutional genesis and function so that judging must ordinarily be done by Judges, not Masters, *LaBuy* v. *Howes Leather Co.*, 1957, 352 U.S. 249, 77 S.Ct. 309, 1 L.Ed.2d 290, Congress recognizes that in administrative adjudication much must be left to hearing officers. Indeed, it is the fact finding function through the inescapable use of hearing officers, their sense of independence, and the review of their findings which has been

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[23] As an illustration of the uncertainty that may be occasioned by an appellate court's remand, see Bros Inc. v. Davidson, 5 Cir., 1964, 330 F. 2d 65, denying writ of mandamus arising out of proceedings pursuant to opinion and remand 5 Cir., 1963, 320 F. 2d 594.

at the core of the concern for improving the quality of such actions. With the wide range of its statutory responsibilities, the number and complexities of the kind of matters it must handle,[24] there is simply no basis for the District Judge taking it on himself to tell the Commission how it should husband and deploy its resources and manpower.

III.

In light of what we have said in Part II concerning the alleged prejudgment of Weingarten's case, the argument that the proceedings before the Commission must be stopped because bias and prejudice has reared "its ugly head," *NLRB* v. *Phelps*, 5 Cir., 1943, 136 F.2d 562, 564, is equally lacking in merit. This is not a case like *Accardi*[25] where the authority having the ultimate decision dictated the result to the body charged with the initial decision. Neither is it a case like *Amos Treat*[26] where one who actively en-

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[24] A brief look at the Federal Trade Commission Annual Rep. 1963 gives a clear indication of the variety and immensity of the task, which aided by its 1,178 staff members, it must perform. For example, the Commission processed outside 4,562 applications for complaint of deceptive practices and reviewed 516,352 radio and TV scripts of commercials and 302,572 pages of print material. It received 1,309 applications for complaint of restraints of trade and issued 230 complaints and 261 orders. It made a total of 14,682 inspections in the process of enforcement of the wool, fur and textile acts. The 19 attorneys assigned to do appellate work for the General Counsel's Office handled 127 cases, an increase of 41 over the previous year. In addition to issuing a total of 431 complaints and 454 cease and desist orders, the Commission conducted numerous economic studies and under its industry guidance program handled by letter and telephone more than 1,500 requests from businessmen on how to resolve their difficulties in conforming their practices with the law.

[25] United States ex rel. Accardi v. Shaughnessy, 1954, 347 U.S. 260, 74 S. Ct. 499, 98 L. Ed. 681.

[26] Amos Treat & Co. v. SEC, D.C. Cir., 1962, 306 F. 2d 260.

gaged in the prosecution of a case at its initial stages became a judge of guilt or innocence at a later stage. There is here no direction to convict—no intimation as to how the initial decision should be made. Indeed, in light of the strict standard of proof announced by the Commission and the rigid directions in regard to the making of findings of fact by the Hearing Examiner, the initial decision may well be in favor of Weingarten.

In light of the foregoing, it is apparent that the injunction must be dissolved.[27] That means, of course, that the Commission is free to reinstate the case on its docket and proceed pursuant to the remand.

Nothing we have said is to be interpreted as a gratuitous effort to influence any Court of Appeals to which the final order, if issued, may be appealed. Ours is quite a different function in reviewing the intrusion of an "outside" Court into the incompleted administrative proceedings. Approached from this vantage point, the reasonableness of agency action of the sort here involved must be tested in light of our recent observation that "Courts are finding day by day that there is both a need to meet extraodinary problems and ample procedural resources to do the job."[28] We cannot say here that the Commission's adoption of a procedure somewhat akin to the two-bite process approved in *Hill* for some Federal Power cases is an unreasonable accommodation of procedural resources to the job at hand.

REVERSED WITH DIRECTIONS TO DISSOLVE THE INJUNCTION.

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[27] The conditional nature of the Commission's dismissal of the proceedings makes inapposite the authorities cited by Weingarten in support of the contention that the matter is now moot.

[28] Hill v. FPC, 5 Cir., 1964, ... F. 2d ...., ... and n. .... [Nos. 20375, 20386, July 23, 1964].

[Court of Appeals Heading Omitted]

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Texas, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed with directions to dissolve the injunction.

September 14, 1964

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1 IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

Civil Action No. 4754

J. Weingarten, Inc.

v.

Federal Trade Commission, et al.

Summation, Observations and Decision of the Court in the Above-Entitled and Numbered Cause—May 15th, 1963

The Court: Gentlemen, the Court is ready to render a decision in this case.

On April the 30th, 1963 the Court entered an Order for the Hearing which we are having today for the purpose of passing upon a Motion for a Preliminary Injunction; also a

Complaint was filed by the Plaintiff, asking for a Declara tory Judgment. The Motion for Injunction, and the Complaint for Declaratory Judgment was filed in the Clerk's Office on April the 29th, 1963. Subsequently an Amended Complaint was filed by the Plaintiff on May the 10th, 1963. Service was had on the Defendants, and the Defendants filed a Motion to Dismiss, and in the alternative, a
2 Motion for Summary Judgment, which was filed on May the 3rd, 1963. Both parties have filed briefs in support of their respective positions, and the Court might state that both briefs are well prepared and we feel the respective briefs completely state the law in regard to the matter presented to the Court, however we feel that the attorneys are following the customary practice of stating the general rules and the law applicable to the facts as they would like to interpret them in the light of their respective positions.

We think the issues have been well tried, well presented, by both parties. The only problem is that in the presentation of the issues, we get opposite positions, and opposite conclusions, which requires the Court to look at this particular case as perhaps an original situation, because of the particular facts in this case. No doubt the fact situation in this case compares in many respects to other cases, and in particular to the cases cited by the Defendants, the Texaco case, and the Proctor & Gamble Company case, yet there are some differences in the fact situations which the Court will comment upon a little later.

In order to develop more of the history or nature of
3 the controversy, the Court would like to say that it is undisputed that the Commission, The Federal Trade Commission, began an investigation in regard to violations by J. Weingarten, Incorporated, in the year 1955. After some five years of investigations, a formal Complaint was filed on May the 5th, 1960, alleging that J. Weingarten, Incorporated, in Cause No. 7714, was guilty of certain violations under Section Five of The Federal Trade Commis-

sion Act, 15 U.S.C., Section 45, in two particulars: That Weingarten knowingly induced and received promotional allowances from suppliers which it knew, or should have known, were a violation of the law, and, second, that Weingarten did not expend all of the monies received from suppliers for promotional purposes, but diverted substantial amounts thereof to its own use.

The matter came before the Examiner, and after due hearings before the Examiner, the offering of testimony, and the opportunity of all parties to be heard fully, on May 1st, 1962 the Examiner issued a decision, concluding that evidence had been offered supporting the Complaint as to Charge No. 1, but not as to Charge No. 2. Weingarten appealed the decision of the Hearing Examiner to the Commission as to Point One, and it appears that Point Two then became settled by virtue of no appeal.

After the matter was appealed to the Commission, on May 25th, 1963, almost eleven months later, the Commission entered an Order and Opinion, which was attached to the Pleadings of the Plaintiff, in which the Commission held, "That after a review of all the evidence, the Commission finds that the Government has failed to establish the alleged violation." Further, in the Order and Opinion, the Commission remands the case back to the Hearing Examiner for more evidence, and a subsequent ruling by the Hearing Examiner, there being some mention made in the Defendants' Brief that the Hearing Examiner should have supported the original conclusions with more adequate findings than were made in the decision of May the 1st, 1962.

The Plaintiff, of course, is complaining of the improper Remand Order entered by the Commission, and is seeking this Declaratory Judgment, and an Injunction, enjoining any further hearing in regard to this case, and insisting that a Mandamus be issued requiring the Commission to dismiss the Complaint.

Now, as to the question of jurisdiction, the Court feels that it has jurisdiction of this matter. We feel that
5 jurisdiction can be supported by Section 6a of The Administrative Procedure Act, 5 U.S.C. 1005a, on the basis that the Complainant has failed to proceed with reasonable dispatch. As was stated in Mr. Wilson's argument, I believe, Counsel for the Defendants, Mr. Rhynedance, practically, if not actually, concedes the fact that the Court does have jurisdiction of this matter. Furthermore, in Mr. Rhynedance's brief, or the brief for The Federal Trade Commission, he concedes as much in referring to the case of Deering Milliken, Incorporated versus Johnston, in which the Court held, "Although deciding that a District Court has jurisdiction to enjoin an administrative proceeding that is not being concluded with the reasonable dispatch required by Section 6a of The Administrative Procedure Act, 5 U.S.C. 1005a."

As to the question of the Defendants' Motion for Summary Judgment, the Court feels that it is not necessary to pass upon the Motion for Summary Judgment, or rather the Court feels that the Defendants' Motion for Summary Judgment should be overruled in view of the fact that we will find that the Plaintiff is entitled to their injunctive relief. The Court is making a distinction between this case and the Texaco case. In the Texaco case the Trial
6 Court was restricting the time that the Hearing Examiner would use in making a determination on the Motion to Remand, and no doubt that was the proper procedure in that particular case. I am mindful of the fact that the Court in this case could also make a similar disposition by limiting the time that the Hearing Examiner could consider the cause under the Order to Remand, but we do not feel that this would be the fair disposition in this particular case. Having the benefit of the facts and circumstances presented in this case, we feel that the Plaintiff is entitled to injunctive relief.

In the Texaco case the Court expressed the opinion that the Plaintiffs are not likely to succeed on the merits, whereas in this case, from what we have learned of the facts, and the action of the Commission in saying that a Complaint has not been established by sufficient evidence, the Court cannot help but believe that on the merits the Plaintiff in this particular case would succeed, rather than not succeeding.

We can see no useful purpose to be served by the Remand Order in this case, and this is due to the fact that Mr. Howrey, in his affidavit which is attached to the Motion for an Injunction, sets out rather in detail the con-
7 versations, and the preliminary hearing had before the Hearing Examiner, and it is obvious from this hearing that the Hearing Examiner was certainly in the dark as to what was expected of him, other than he was certainly impressed with the fact that the Commission wanted him to, in some way, find some evidence that would be detrimental to J. Weingarten, Incorporated, but the thing that is not in doubt, insofar as this Court can determine from observations and statements of the Hearing Examiner was that the Hearing Examiner was not sure as to how to make the determination. This would lead the Court to believe that there was very little likelihood of success to the extent of finding testimony that would help establish a Complaint against Weingarten.

Furthermore, the Court cannot help but feel that in this case that if the Commission is of the opinion that the matter should have been remanded for additional testimony, that this determination could have been made sooner than it was. It is true eleven months is not a lengthy time for the matter to remain before the Commission, but taken in connection with an investigation of five years, and a hear-
ing before the Hearing Examiner of two years or
8 better, it appears that the question of reasonable dispatch is completely ignored by the Commission.

Furthermore, the Court cannot help but feel that the

Commission was somewhat displeased, to put it as an understatement, in not being able to find sufficient evidence or substantial evidence to justify the charges, and to support the Hearing Examiner's original decision. We feel that the facts in this particular case show some evidence of unfairness on the part of the Commission, and some bias and prejudice, although this Court does not feel that we should pass upon this matter, for even though the Commission could be said to be prejudiced and biased, yet and still, the Commission made a determination and a decision in favor of the Plaintiff Weingarten by saying that there was insufficient evidence to support the Complaint, so such prejudice on the part of the Commission did not affect a finding in favor of Weingarten and the prejudice and bias would be immaterial, but for the fact that it does shed some light upon the Commission's action in remanding this cause.

Further, as the Court understands the procedure under The Federal Trade Cmmission Act, the Commission can do one of a number of things: It may restrict its
9 decisions to questions of law, or to questions of whether the findings are supported by substantial evidence, or the weight of the evidence, as the nature of the case may be. On the other hand, it may make entirely new findings, either upon the record, or upon new evidence which it takes. It may remand the matter to the Hearing Officer for any appropriate further proceedings. It appears to this Court that if the Commission is of the opinion, and the Court must so find that they were from the instructions given in the Order to Remand, that evidence to convict, or to find Weingarten guilty of the charges, is a simple matter to adduce the evidence, then it is difficult for us to understand why the Commission itself did not make the effort to adduce the evidence; therefore, the Court again is of the opinion that the Order to Remand is merely a vehicle to violate the provision of reasonable dispatch, and is evidence of the fact that the Commission is not acting with reasonable dispatch in that they could have had evidence

introduced before the Commission on these matters which they now say is proper for the Hearing Examiner to do in saying that additional testimony may be obtained to support the original charge of unfair competition.

10 If the Commission is not in good faith in acting with reasonable dispatch, then the Order of Remand could serve as an additional delay, and there is no assurance how long it would actually take to perfect the hearing, under the Order of Remand, by the Hearing Examiner, and in due time after a decision is made by the Hearing Examiner, to be reviewed by the Commission. The Commission would further take additional time, and as pointed out by Mr. Wilson, a further remand could be had. Certainly, in a situation of that type, assuming that the Commission is not in good faith, certainly a Court should intervene to avoid this type of harassment, or this type of playing easy with Court Procedure, and, therefore, the Court feels that no harm can come to the Federal Trade Commission or to the general public by the granting of this injunction, but that harm can come, and will come, and will result in irreparable injury if the injunction is not granted, because, certainly, harassment and unreasonable delay is damaging and harmful and costly. Therefore, the Injunction will be granted as prayed for by the Plaintiff.

Now, in regard to the Declaratory Judgment, and the Mandatory Injunction the Court does not feel that

11 it would be proper to direct the Commission to enter an order of dismissal. I think it is proper for the Court to direct the Commission to enter an order of some kind, either in support of the Hearing Examiner on the original decision and opinion, or to take testimony themselves, and either find sufficient evidence in favor of the original Complaint, or to enter an Order of Dismissal. It is a matter that the Commission should pass upon, however we do feel that a time limit should be made, and the Court feels that thirty (30) days from this date would be a sufficient length of time for the Commission to take such action as they wish and deem advisable to take in

regard to either entering an Order dismissing the Complaint, or entering an Order sustaining the findings made by the Hearing Examiner, or to pursue the matter themselves and make such independent findings as they wish to make. If it should develop that the Commission should need more time than the thirty (30) days, the Court would certainly take the matter under advisement and if good cause could be shown that additional time would be needed for the development of evidence that has not previously been developed, then, of course, the Court would grant such additional time as we feel would be proper
12 under the circumstances. We will inquire of Counsel if there are any questions? Mr. Howrey.

Mr. Howrey: As I understand it, Your Honor, you have granted the Injunction prayed for?

The Court: I may make this statement: It is entirely possible that the Court has made some observations, or some findings, which cannot be supported by the law. I say this in view of the fact that this is the first opportunity that we have had to become acquainted with this type of case, and it may be that some of the views of the Court are not sound from the standpoint of being supported by the law, not from the standpoint of the facts, but if that is the situation, the Court, of course, will be happy to have Counsel call his attention to any obvious error, and we will give Counsel ten (10) days from this date in which to prepare an appropriate Order, and if you wish, you may accompany the Order with proposed Findings of Fact and Conclusions of Law.

Mr. Rhynedance: May it please, Your Honor.

The Court: Mr. Rhynedance.

Mr. Rhynedance: Because of my office being in Washington, D. C., and Mr. Blalock giving me such able assistance, but being often quite busy with other matters, I'm not sure what the Commission's position would be, and at
13 some point I should move for a stay pending appeal —I don't know if one will be taken—and if this is the appropriate time, I would like to make such a Motion.

I'm not sure that it is, since an Order has not, and will not, apparently, be entered at this time, but just for the record, I do so move for a stay pending appeal.

The Court: All right, sir, we will certainly give your request ever consideration, and pass upon your Motion when such request is made.

Do you care to say something further, Mr. Howrey?

Mr. Howrey: Well, I wonder if I could make another inquiry, Your Honor?

The Court: Yes, sir.

Mr. Howrey: There are certain steps which have to be—which the Hearing Examiner has ordered, one is that the Pretrial Agreement be filed by a certain date, and then another Pretrial Conference be held at a certain date, and that then the trial date be set. As I understand it, under your Order, all of those things will be enjoined?

The Court: Yes, sir. That is correct.

Mr. Howrey: And that the Order which you propose to enter will enjoin all further proceedings of any kind, but give the Commission thirty (30) days to make an
14 Order of the type you have described, if they care to do so. Is that a fair summary of it, Your Honor?

The Court: Yes, sir. I'm not sure just how broad your injunction request might be, whether—I know you filed an amendment in regard to a Mandamus.

Mr. Howrey: Yes, sir.

The Court: And that is what I had reference to in regard to the thirty (30) days period.

Mr. Howrey: Yes, sir.

The Court: In other words, I made the observation, and perhaps did not do so with sufficient clarity, but I made the observation that I did not think that this Court should tell the Commission that you must enter an Order of Dismissal. I do think that this Court should tell the Commission you must do something; you must enter some kind of an Order. I'm not telling them what kind of an Order to enter, but some Order, and placing a date, in order that there might not be further unreasonable delay, or failure

to act with reasonable dispatch. Now, that was my thought.

Mr. Howrey: Yes, sir, and in the meantime all proceedings for the Hearing, then, are stayed?

The Court: Yes, sir, everything in regard to the Order to Remand is stayed and enjoined.

15 Mr. Howrey: Thank you, Your Honor.

The Court: All right, Gentlemen, the Court would like to further say that it has been a pleasure to have presided at this hearing. It is always interesting to get something new, and it is particularly gratifying to have attorneys who are so learned in a particular subject, and we usually find this in specialized fields, so you may be assured that we feel that this hearing has been beneficial to the Court, if not necessarily gratifying to the litigants.

We will stand adjourned.

(Conclusion of Hearing)

The State of Texas }
County of Jefferson }

I, Allan H. Burbage, Jr., Official Court Reporter for the United States District Court, Eastern District of Texas, hereby certify that the foregoing 15 pages constitute the summation, observations and decision of the Court in the above entitled and numbered cause on May 15th, 1963.

Witness my official hand at Beaumont, Texas, this the 17th day of May, A. D. 1963.

Allan H. Burbage, Jr.
Allan H. Burbage, Jr.
Official Court Reporter
United States District Court
Federal Building—
P. O. Box 268
Beaumont, Texas

Filed July 11, 1963

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
(BEAUMONT DIVISION)

Civil Action No. 4754

J. WEINGARTEN, INC., a corporation, 600 Lockwood Drive, Houston, Texas, *Plaintiff*,

v.

THE FEDERAL TRADE COMMISSION,
PAUL RAND DIXON, *Chairman*,
SIGURD ANDERSON, *Member*,
PHILIP ELMAN, *Member*,
A. EVERETTE MACINTYRE, *Member*,
A. LEON HIGGINBOTHAM, JR., *Member*,
WALTER R. JOHNSON, *Hearing Examiner*,
ERNEST D. OAKLAND, *Complaint Counsel*,
Washington 25, D. C.

Defendants.

Findings of Fact and Conclusions of Law

The above-entitled matter having come on regularly for hearing on May 15, 1963 on the plaintiff's motion for preliminary injunction, and the defendants' motion to dismiss, or, in the alternative, for summary judgment; affidavits and points and authorities of both parties having been submitted therewith; the matter having been argued orally, and the court having fully considered the verified complaint, the said motions, affidavits, points and authorities, the oral arguments and all documents filed herein, and being fully advised in the premises, the court makes the following findings of fact and conclusions of law.

1. Plaintiff J. Weingarten, Inc. (hereinafter sometimes called "Weingarten") is a corporation organized and existing under the laws of the State of Texas, with its principal office at 600 Lockwood Drive, Houston, Texas. It is a

retail grocery chain with stores located in Texas, Louisiana and Tennessee.

2. Defendant Federal Trade Commission (hereinafter sometimes called "the Commission") is a federal agency organized and existing pursuant to the Federal Trade Commission Act (15 U.S.C. § 41 et seq.). It administers said Act and the Clayton Act as amended (15 U.S.C. § 12 et seq.).

3. Defendant Paul Rand Dixon is Chairman and defendants Sigurd Anderson, Philip Elman, A. Everette MacIntyre and A. Leon Higginbotham, Jr., are members of the Federal Trade Commission, each having been duly appointed by the President, confirmed by the Senate and having taken oath and entered upon the duties of a member of the Commission; and they are now duly qualified and voting members of the Commission pursuant to statute. Defendant Walter R. Johnson is a hearing examiner for said Commission, having been duly appointed and having taken oath and entered upon the duties of a hearing examiner. Defendant Ernest D. Oakland is an attorney employed by defendant Commission and has been assigned to prosecute the proceeding entitled "In the Matter of J. Weingarten, Inc., Docket No. 7714."

4. After repeated investigations commencing in 1955, the Commission issued a complaint against plaintiff on January 5, 1960, in said matter. The complaint charged plaintiff with violations of Section 5 of the Federal Trade Commission Act[1] in two particulars: First, that Weingarten knowingly induced and received discriminatory promotional allowances from suppliers which it knew or should

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[1] In pertinent part Section 5 of the Federal Trade Commission Act provides:

> Unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce, are declared unlawful (15 U.S.C. 45(a)).

have known were violative of law;[2] and second, that Weingarten did not expend all of the money received from suppliers for promotional purposes, but diverted substantial amounts to its own use. As to the first charge, it was alleged that such allowances were not made available by suppliers on proportionally equal terms to all other customers of such suppliers competing with Weingarten in the sale and distribution of such suppliers' products. Specifically, the complaint charged the receipt of these discriminatory allowances from 7 specified suppliers.[3]

5. After the usual preliminary steps, hearings were held before defendant Hearing Examiner commencing on June 30, 1960. In the course of these hearings, complaint counsel introduced oral testimony of many witnesses, as well as many exhibits. On May 29, 1961, all parties having rested, the Hearing Examiner ordered the testimony in the case closed. Thereafter, all parties filed extensive

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[2] That is, violative of Section 2(d) of the Clayton Act which provides:

> (d) That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

[3] These were:

Max Factor & Co.
Nestle-LeMur Co.
Lanolin Plus, Inc.
Yakima Fruit & Cold Storage Co.
Shreveport Macaroni Manufacturing Co., Inc.
Ipswich Hosiery Co.
Vanity Fair Paper Mills, Inc.

briefs, proposed findings of fact and conclusions of law and had oral argument before the Hearing Examiner. In its proposed findings of fact and conclusions plaintiff urged, *inter alia*, that government counsel had failed to prove the crucial fact that other customers of the same suppliers, competing with plaintiff in the sale of the same goods of like grade and quality at the time, had not received similar payments. Numerous other failures in the government's proof were cited. Government counsel contended, on the other hand, that the evidence demonstrated that competitors who actually handled the same goods as plaintiff and were in direct competition with plaintiff had not received these payments, and all other facts necessary to establish a violation. Commission counsel never asked to adduce more proof on this or any other point and, indeed, there was no showing that any further proof existed upon any point.

6. On May 1, 1962, the Hearing Examiner issued his Initial Decision, concluding that plaintiff had induced and received promotional allowances in violation of § 5 of the Federal Trade Commission Act. However, the Hearing Examiner ruled that complaint counsel had failed to prove the second charge, i.e, that plaintiff had diverted substantial amounts of these payments to its own use. Plaintiff appealed the first point to the full Commission. Complaint counsel accepted the Hearing Examiner's decision *in toto* and did not appeal.[4]

7. On March 25, 1963, after full brief and argument, the Commission issued its order and opinion. After a "review of the evidence", the Commission held that the government had failed to establish the alleged violation. However, instead of dismissing the complaint, the Commission remanded the case to the Hearing Examiner for the taking of additional evidence.

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[4] Thus, the decision on the second charge is now final. F.T.C. Rules of Practice, Rules 4.19, 4.20 and 4.21, Subpart F, Part 4.

The order of remand of March 25, 1963 came after the matter had been under consideration by the Commission for some 8 years—5 years of investigation and 3 years of litigation. The period between the decision of the Hearing Examiner and the order of remand was some 11 months.

8. As stated in its oral opinion of May 15, 1963, the Court finds that the Commission's remand was made for the purpose of finding evidence detrimental to Weingarten. Furthermore, the Court cannot help but feel that the Commission was somewhat displeased, to put it as an understatement, in not being able to find sufficient evidence or substantial evidence to justify the charges, and to support the Hearing Examiner's original decision. We feel that the facts in this particular case show some evidence of unfairness on the part of the Commission, and some bias and prejudice which sheds some light upon the Commission's action in remanding this case. A cursory reading of the Commission's option amply supports the Court's finding. Thus, the Commission outlined the basic elements of the violation in the following language:

The basic factual elements of the violation are:

1. The solicitation and receipt by respondent [plaintiff] in commerce of payments for promotional services in connection with the resale of a supplier's products.

2. That at approximately the time of the solicitation and receipt, other customers of the supplier were competing with the recipient in the distribution of the grantor-supplier's goods of like grade and quality.

3. The payments received by respondent [plaintiff] were not affirmatively offered by the suppliers to such competing customers on proportionally equal terms.

4. That respondent [plaintiff] possessed information sufficient to put upon it the duty of making inquiry to ascertain whether the granting suppliers were making

such payments available to its competitors on proportionally equal terms.

Speaking of the second element, the Commission said:

> *Proof sufficient to establish the second criteria should not be difficult to adduce,* since it involves merely a showing of the exact identity of the products purchased by the respondent [plaintiff] from a supplier who granted it an allegedly discriminatory promotional allowance and the same showing for any of respondent's competitors who did not receive the allowance (Emphasis added).

Moreover, the Commission indicated that it believes that specific witnesses could testify to facts which would establish this element, as follows:

> These witnesses were probably in command of the facts needed to satisfy this criteria but the examination of counsel failed to elicit them.

The Commission's sympathies were expressed as follows:

> While the Commission is sympathetic to the proposition that voluntary cooperative retail groups of the type here involved are entitled to the protection of the Act, we are faced in this instance with a dirth [sic] of factual information upon which to predicate a finding . . .

The Commission then stated:

> There is no question but that the public interest cannot be permitted to suffer because of the mistakes of Commission personnel.

Finally, the Commission instructed:

> It is not contemplated that more than five full hearing days for each side will be needed to adequately *shore*

> *up this record*, although the Commission sees no need to actually order a limitation on the length of the hearing (Emphasis added).

The Commission attempted to justify this procedure upon the ground of "public interest", stating:

> This case . . . is fraught with a great deal of public interest, for its successful prosecution may affect the cessation of a whole series of law violations [by third persons not parties to this proceeding].
>
> This matter has now been in litigation for slightly more than three years and both the public and the respondent have incurred substantial expense in its trial. As we stated earlier, this case is attended with a great deal of public interest and to now order dismissal for failure of proof . . . would waste all of the money and effort heretofore expended.

It appears to this Court that if the Commission is of the opinion, and the Court must so find that they were from the instructions given in the order to remand, that evidence to convict, or to find Weingarten guilty of the charges, is a simple matter to adduce the evidence, then it is difficult for us to understand why the Commission itself did not make the effort to adduce the evidence; therefore, the Court again is of the opinion that the order to remand is merely a vehicle to violate the provision of reasonable dispatch, and is evidence of the fact that the Commission is not acting with reasonable dispatch in that they could have had evidence introduced before the Commission on these matters which they now say is proper for the Hearing Examiner to do in saying that additional testimony may be obtained to support the original charge of unfair competition.

9. The Commission's reliance on "the public interest" for its action is based upon avoidance of a multiplicity of

suits against suppliers to secure the same relief. Thus, the Commission states:

> The alternative of an approach of this type (further proceedings against plaintiff) is to bring complaints against each supplier suspected of granting a discriminatory promotional allowance to the respondent. This could, of course, result in a myriad number of suits with attendant expense. This case, therefore, is fraught with a great deal of public interest, for its successful prosecution may affect the cessation of a whole series of law violations.

Based on the record, there are no "myriad" number of suppliers suspected of granting discriminatory allowances to plaintiff. The Commission's complaint alleged that only 7 suppliers had made unlawful promotional payments. They were:

Max Factor & Co.
Nestle-LeMur Co.
Lanolin Plus, Inc.
Yakima Fruit & Cold Storage Co.
Shreveport Macaroni Manufacturing Co., Inc.
Ipswich Hosiery Co.
Vanity Fair Paper Mills, Inc.

The only supplier unnamed in the complaint which the Commission contended made illegal payments to plaintiff was Shulton, Inc. Although the Commission spent 5 years investigating plaintiff's practices prior to the filing of the complaint, no evidence as to any supplier other than these 8 was relied upon by either the examiner or the Commission, although evidence as to other suppliers was received. In the proceeding conducted before the Hearing Examiner, no evidence was relied upon to show that any other supplier made unlawful promotional payments to plaintiff.

The crucial fact is that the Commission filed complaints against each of these suppliers on the same date that com-

plaint was filed against plaintiff. There is no substance, therefore, to the claim that plaintiff must be subjected to a retrial to protect the public interest.

10. The remand and the proposed new hearings were directed to the same "factual elements" and the same issues and were for the same purpose as the prior trial. There was no claim that any additional evidence had been discovered. There is no basis in the record for the suggestion that facts sufficient to make a case against plaintiff should have been available to government counsel, nor is it reasonable to conclude that such facts could be made available at this late date. Hence the Court further finds that no useful purpose would be served by the remand.

11. A pre-trial conference was held in said Federal Trade Commission proceeding on April 16, 1963, before Walter R. Johnson, Hearing Examiner. The following excerpts from the transcript of said conference are relevant to the Court's finding that no useful purpose would be served by the remand:

> Hearing Examiner Johnson: The hearing will come to order.
>
> This is in the matter of J. Weingarten, Inc., a corporation. This is a prehearing conference, called by the Hearing Examiner to consider an order vacating the initial decision of the Hearing Examiner, and remanding it to him for further consideration.
>
> I am not sure exactly what the mandate is, except that I am supposed to do something witihn 90 days. And in that respect, the Hearing Examiner, unless the Commission otherwise directs, or there is some other sort of a mandate—he intends to proceed in keeping with that direction.
>
> • • •
>
> Hearing Examiner Johnson: . . .
>
> What is your theory, Mr. Oakland, as to how we should proceed in this case? Are you in a position

to tell us at this point what witnesses you intend to employ, the nature of their testimony.

Mr. Oakland: No, sir, I am not. Obviously, before I can do that, there has to be some planning and investigation of how to go about this. Although the opinion sets forth some elements of lack of proof, there is a good deal of latitude, as I read it, as to what can be done to shore up the record as it exists. It is a difficult task to attempt to determine just what the Commission desires to complete the proof in this case.

* * *

Hearing Examiner Johnson: Well, . . . are you in a position to tell us what evidence you want to present?

Mr. Oakland: I will be when I have contacted certain sources of information, to see what, if any, information can be obtained to prove what I believe the Commission wants in the way of proof to complete this record. But I am not in a position to do that now.

* * *

Hearing Examiner Johnson: Well, I can't tell what is in the Commission's mind except what is written here, and I take it as a mandate that you and I [complaint counsel] are supposed to forget about any other business we have in connection with the Commission, and get on the ball as far as this case is concerned, and have it completed in 90 days.

And that is to be the attitude of the Hearing Examiner. And if you feel you need more time than that, you will have to make application, and I will be happy to refer the matter to the Commission to give it what consideration they want to.

I don't know if this is due process. But we will have to assume that they consider it due process. And of course I don't know if they can direct the respondents to forget about every bit of their other business and proceed in keeping with this order, and consider

it due process. But that is what is says. And the Hearing Examiner will attempt to follow out that mandate.

• • •

Hearing Examiner Johnson: Well, I will say this, Mr. Howrey. I am going to proceed on the basis of the order that has been issued. And unless the Commission directs otherwise, or I have a directive from any other authority to the contrary, I intend to proceed that way.

• • •

Mr. Oakland: I, too, like the Examiner, would have to proceed on the remand, notwithstanding any announcement this morning of an impending or shortly impending injunction proceeding. And I fully agree that we have to get the show on the road.

I would add still that I contemplate a thorough and somewhat detailed investigation, which I am going to probably have to explore several afternoons [sic—avenues]and perhaps will also require some information by way of subpoena.

• • •

Mr. Oakland: I would have to stand by my previous remarks.

Hearing Examiner Johnson: But you realize the predicament.

Mr. Oakland: I am well aware of it.

Hearing Examiner Johnson: I want to follow out the mandate. It may be unreasonable, Mr. Oakland, but on the time table that we have, I think we are going to have to step up the filing of these briefs.

• • •

Mr. Howrey: May I just make a statement so that silence won't be considered acquiescence in the Commission's position.

I think the Commission's opinion, fixing the five days of hearing, and 90 days for completion is not realistic,

is not fair, and cannot be complied with as a matter of human endeavor. And so I just think I should state that for the record.

I don't expect Mr. Oakland to join me, but I say it on his behalf as much as on our own.

Hearing Examiner Johnson: Well, from what I know of the case, I will state for the record—I likewise will make the statement that I do not consider that order realistic.

12. It is obvious that the Hearing Examiner was in the dark as to what was expected of him, other than he was certainly impressed with the fact that the Commission wanted him to, in some way, find some evidence that would be detrimental to J. Weingarten, Inc., but the thing that is not in doubt was that the Hearing Examiner was not sure as to how to make the determination. This would lead the Court to believe that there was very little likelihood of success to the extent of finding testimony that would help establish a complaint against Weingarten.

13. Beginning in 1955, plaintiff was thoroughly investigated by investigators of the defendant Commission. Again in 1958, investigators of defendant Commission returned and re-investigated plaintiff, and yet a third time they returned and conducted a further investigation of plaintiff in 1959. In each instance plaintiff cooperated with said investigators and furnished everything requested. The information furnished dealt primarily with plaintiff's annual anniversary sales for the years 1954, 1958 and 1959. When it came to trial government counsel relied primarily on evidence with respect to the years 1958 and 1959 and the Initial Decision of the Hearing Examiner and the Opinion of the Commission upon review dealt almost exclusively with those years. It is this evidence which complaint counsel is now ordered to "shore up."

These facts also lead the Court to believe that there is very little likelihood of success to the extent of finding

testimony that would establish a complaint against Weingarten.

14. There is no assurance how long it would actually take to perfect the hearing, under the order of remand. After the reception of the evidence by the Hearing Examiner, the case would be briefed and argued before him and he would be required to prepare another initial decision. The Commission would further take additional time for brief and argument before it and in the preparation of its decision

CONCLUSIONS

15. This Court has jurisdiction to grant the relief requested by plaintiff:

Section 6(a) of the Administrative Procedure Act, 5 U.S.C., Sec. 1005(a).

Section 10 of the Administrative Procedure Act, 5 U.S.C., Sec. 1009.

Section 1 of the Declaratory Judgment Act, 45 U.S.C. Sec. 2201.

The Act of October 5, 1962, 28 U.S.C. Sec. 1361.

Deering Milliken Co. v. *Johnston*, 295 F. 2d 856 (4th Cir. 1961).

Texaco, Inc. v. *Federal Trade Commission*, 1962 CCH Trade Cases, ¶ 70,382 (D.D.C. 1961).

16. The Federal Trade Commission has failed to act with reasonable dispatch in violation of Section 6(a) of the Administrative Procedure Act by remanding the complaint against J. Weingarten, Inc. in Dkt. No. 7714 to the Hearing Examiner for a retrial of once-litigated issues.

17. The Court has carefully read and considered the proceedings in the United States District Court for the District of Columbia in *Texaco, Inc.* v. *Federal Trade Com-*

mission, supra, and *Procter & Gamble Co.* v. *Federal Trade Commission*, Civil Action No. 3798-61, and has concluded that there are fact differences and that said cases are inapposite precedents for a determination of the instant case.

In the *Texaco* case, the district court held that it had jurisdiction and that *Texaco* should be granted injunctive relief if the Hearing Examiner did not complete a remanded proceeding within a specified period of time following the district court's order. The Court is making a distinction between this case and the *Texaco* case. In the *Texaco* case, the trial court was restricting the time that the Hearing Examiner would use in making a determination on the Motion to Remand, and no doubt that was the proper procedure in that particular case. I am mindful of the fact that the Court in this case could also make a similar disposition by limiting the time that the Hearing Examiner could consider the cause under the order to remand, but we do not feel that this would be the fair disposition in this particular case. Having the benefit of the facts and circumstances presented in this case, we feel that the plaintiff is entitled to injunctive relief against a clear violation of Section 6(a) of the Administrative Procedure Act.

18. If the Commission was of the opinion that the matter should have been remanded for additional testimony, this determination could have been made sooner than it was. It is true eleven months is not a long time for the matter to remain before the Commission, but taken in connection with an investigation of 5 years, and a hearing before the Hearing Examiner of 2 years or better, it appears that the question of reasonable dispatch is completely ignored by the Commission.

19. It appears to this Court that if the Commission is of the opinion, and the Court must so find that they were from the instructions given in the order to remand, that evidence to convict, or to find Weingarten guilty of the

charges, is a simple matter to adduce, then it is difficult for us to understand why the Commission itself did not make the effort to adduce the evidence. Therefore, the Court is of the opinion that the order to remand is merely a vehicle to violate the provisions in Section 6(a) of the Administrative Procedure Act requiring reasonable dispatch, and is evidence of the fact that the Commission is not acting with reasonable dispatch.

20. Unless plaintiff's rights are determined and defendants' acts and intended acts are restrained, plaintiff will be irreparably injured and will have no adequate remedy at law, in that:

a. If hearings are held before the Hearing Examiner pursuant to the remand order, the plaintiff will have no right to attack there the propriety of the Commission's opinion and the Commission's action in remanding the case. Nor will it there have any effective right to assert its contention that the opinion and order and the taking of additional evidence pursuant thereto constitute a denial of plaintiff's rights under the Administrative Procedure Act and the Federal Trade Commission Act.

b. The right of court review under Section 5 of the Federal Trade Commission Act is inadequate in that it is available only after the damage is done and the violations of the plaintiff's rights, as alleged herein, have prevailed and had their full force and effect.

c. The order of remand could serve as an additional delay, and there is no assurance how long it would actually take to perfect the hearing, under the order of remand, by the Hearing Examiner, and in due time after a decision is made by the Hearing Examiner, to be reviewed by the Commission. The Commission would further take additional time, and a further remand could be had. Certainly, in a situation of this type, a court should intervene to avoid this type of

harassment, or this type of playing easy with court procedures, and, therefore, the Court feels that no harm can come to the Federal Trade Commission or to the general public by the granting of this injunction, but that harm can come, and will come, and will result in irreparable injury, if the injunction is not granted, because, certainly, harassment and unreasonable delay is damaging and harmful and costly.

21. The Court concludes that the plaintiff is entitled to the entry of an order enjoining the conduct of all proceedings in connection with the Commission's remand of this matter to Hearing Examiner Walter R. Johnson, or any other Hearing Officer.

22. Having concluded that the defendants have violated Section 6(a) of the Administrative Procedure Act, and that the plaintiff is entitled to injunctive relief, the court concludes that the defendants' motion to dismiss, or in the alternative, for summary judgment, should be denied.

23. In regard to the declaratory judgment and the mandatory injunction, the Court does not feel that it would be proper to direct the Commission to enter an order of dismissal at this time. As stated in the Court's oral opinion of May 15, 1963, this is a matter which the Commission should pass upon. However, a time limit should be made, and the Court feels that ninety (90) days from May 15, 1963 should be a sufficient length of time for the Commission to take such action as they wish and deem advisable to take in regard to finally disposing of this matter, consistent with said opinion, these findings and conclusions, and the Order herein entered.

ENTERED this 11th day of July, 1963.

JOE J. FISHER
U. S. District Judge

Filed July 11, 1963

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
(BEAUMONT DIVISION)

Civil Action No. 4754

J. WEINGARTEN, INC., a corporation, 600 Lockwood Drive, Houston, Texas, *Plaintiff*,

v.

THE FEDERAL TRADE COMMISSION,
PAUL RAND DIXON, *Chairman*,
SIGURD ANDERSON, *Member*,
PHILIP ELMAN, *Member*,
A. EVERETTE MACINTYRE, *Member*,
A. LEON HIGGINBOTHAM, JR., *Member*,
WALTER R. JOHNSON, *Hearing Examiner*,
ERNEST D. OAKLAND, *Complaint Counsel*,
Washington 25, D. C.

Defendants.

Order

On consideration of plaintiff's motion for injunction and defendants' motion to dismiss, or in the alternative, for summary judgment, and the Court having considered the verified pleadings, affidavits, exhibits, and the record herein, and the parties having filed memoranda of points and authorities in support of and in opposition to the said motions, and the Court having heard oral argument in open court, and it appearing to the Court that said Federal Trade Commission order and opinion of remand of March 25, 1963, will irreparably injure plaintiff, and the Court having rendered its oral opinion on May 15, 1963 and made and filed its findings of fact and conclusions of law, it is

ORDERED that:

Defendants, their agents, employees and attorneys and all persons in active concert and participation with

them be and they hereby are restrained and enjoined from remanding the case of J. Weingarten, Inc., FTC Docket No. 7714, to said Hearing Examiner or other hearing officer or from holding any hearings or other proceedings or from taking any further action of any kind, directly or indirectly, under and by virtue of said order and opinion of remand.

b. Within ninety (90) days from May 15, 1963, defendant Federal Trade Commission and defendants Dixon, Anderson, Elman, MacIntyre and Higginbotham make and issue a final order, disposing of said case before the Federal Trade Commission.

c. Defendants' motion to dismiss, or in the alternative, for summary judgment be and the same hereby is denied.

d. The Court retains jurisdiction of this cause for any subsequent proceedings consequent upon this order.

ENTERED this 11th day of July, 1963.

Original Signed By

JOE J. FISHER
United States District Judge

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:
PAUL RAND DIXON, *Chairman*
SIGURD ANDERSON
PHILIP ELMAN
EVERETTE MACINTYRE
A. LEON HIGGINBOTHAM, JR.

Docket No. 7714

In the Matter of

J. WEINGARTEN, INC., a corporation.

Order Vacating Initial Decision and Remanding Matter to Hearing Examiner

This matter having come on to be heard upon respondent's appeal from the hearing examiner's initial decision holding it in violation of Section 5 of the Federal Trade Commission Act; and

The Commission having determined that the initial should be vacated and the matter returned to the hearing examiner for further proceedings;

IT IS ORDERED that this matter be, and it hereby is, remanded to the hearing examiner for further proceedings and consideration in light of the views expressed in the attached opinion.

IT IS FURTHER ORDERED that the hearing examiner and the parties make every effort, including postponement, where necessary, of other Commission matters, to complete the reception of evidence within ninety (90) days from service of this order.

By the Commission. Commissioners Anderson and Elman without joining in the opinion of Commissioners Dixon and MacIntyre agree that the matter should be re-

manded to the hearing examiner for the taking of further evidence, and should be promptly disposed of on remand; and Commissioner Higginbotham did not participate by reason of the fact that this matter was argued before the Commission prior to the time when he was sworn into office.

(SEAL) JOSEPH W. SHEA
Joseph W. Shea,
Secretary.

ISSUED: March 25, 1963

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Commissioners:

Paul Rand Dixon, Chairman
Sigurd Anderson
Philip Elman
Everette MacIntyre
A. Leon Higginbotham, Jr.

Docket No. 7714

In the Matter of
J. WEINGARTEN, INC., a corporation.

Opinion

By Dixon and MacIntyre, Commissioners:

This matter is before the Commission for consideration of the respondent's appeal from the hearing examiner's decision holding it in violation of Section 5 of the Federal Trade Commission Act. The initial decision contains an order to cease and desist which would enjoin respondent from engaging in the practices found to be unlawful.

The respondent, a grocery retail chain, is charged in Paragraph Five of the complaint as follows:

> "In the course and conduct of its business in commerce, respondent has knowingly induced or received the payment or contracted for the payment of something of value to respondent or for respondent's benefit as compensation or in consideration for services and facilities furnished by or through respondent in connection with respondent's offering for sale or sale of products sold to respondent by many of its suppliers, and which payments were not made available by such suppliers on proportionally equal terms to all other customers of such suppliers competing with respondent in the sale and distribution of such suppliers' products."

In essence, the practice challenged by the complaint is the knowing inducement or receipt of promotional allowances from suppliers who violated Section 2(d) of the Robinson-Patman Act by granting said allowances. The alternative to an approach of this type is to bring complaints against each supplier suspected of granting a discriminatory promotional allowance to the respondent. This could, of course, result in a myriad number of suits with attendant expense. This case, therefore, is fraught with a great deal of public interest, for its successful prosecution may affect the cessation of a whole series of law violations.

We turn now to a consideration of the questions raised by the respondent's appeal. Two of respondent's exceptions go to the Commission's jurisdiction and logically must be dealt with first. In the first of these challenges, respondent alleges that the Commission does not have jurisdiction to utilize Section 5 of the Federal Trade Commission Act to bring an action based upon an alleged and knowing inducement or receipt of a promotional allowance violative of Section 2(d) of the Robinson-Patman Act. Respondent does not seriously argue this point, for it rec-

ognizes that three circuit court opinions have dealt with this same question and have supported the Commission in its views.[1] The dispostion of this question in *Giant Foods, Inc.* v. *Federal Trade Commission* is typical of the approach taken by the courts to respondent's plea. In that proceeding Judge Bastian, writing for a unanimous court, stated:

> "The Commission's decision in this case cannot be read as if the Commission were attempting to render illegal a practice which was once lawful. The situation is to the contrary: the Commission is merely declaring to be an unfair method of competition a practice which is plainly contrary to the policy of the Clayton Act as amended by the Robinson-Patman Act." (307 F. 2d at 186.)

In its second attack on the Commission's jurisdiction, the respondent charges that it is a live poultry dealer within the meaning of Section 218(b) of Title 7, U.S.C., and is therefore subject to the exclusive jurisdiction of the Secretary of Agriculture under the provisions of Section 227 of Title 7, U.S.C. With this appeal, respondent is asking us to reverse our prior ruling of September 9, 1960, denying respondent's interlocutory appeal from the hearing examiner's denial of its motion to dismiss based in part upon this contention. Respondent presents no new facts or legal justification in support of its plea and there is nothing before the Commission to support a conclusion that its prior decision was in any way incorrect.

The most serious charge which respondent levels at the hearing examiner's decision is that the basic allegations of the complaint have not been established by reliable and substantial evidence. Respondent contends that the record

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[1] *Grand Union Co.* v. *Federal Trade Commission*, 300 F. 2d 92 (2nd Cir. 1962); *American News Co.* v. *Federal Trade Commission*, 300 F. 2d 104 (2nd Cir. 1962); *Giant Foods, Inc.* v *Federal Trade Commission*, 307 F. 2d 184 (D.C. Cir. 1962).

is devoid of probative evidence to establish (1) that its suppliers granted it discriminatory promotional allowances, and (2) that it had knowingly received or induced such allowances. Resolution of these questions requires a brief sojourn into the facts which are firmly established and not in dispute.

Respondent is a corporation operating sixty-three retail grocery stores in Texas, Louisiana and Tennessee. In addition to food items, many of respondent's stores make substantial sales of cosmetics and a wide variety of household products. Total sales of the corporation in a recent fiscal year exceeded $137,000,000.

For some years past the respondent has conducted special or feature sales of certain of its goods with attendant extensive promotional activity. Such sales usually have a theme which serves to identify and distinguish them from less exceptional promotions. In this matter, the principal promotions of interest were held in 1957 and 1958, and were labeled: Fifty-Seventh and Fifty-Eighth Anniversary Sales (AS); Twentieth and Twenty-First Texas and Louisiana Products Sales (TLPS); Ninth and Tenth Annual May Health and Beauty Carnivals (AMHBC); and Twelfth and Thirteenth Home Center Birthday Sales (HCBS).

The aim of these promotions is, of course, to increase sales of the products featured and to this end respondent utilizes all advertising media, including radio, television and newspapers. As every business man knows, extensive use of these media costs a good deal of money and respondent's efforts to defer these costs to others led to this complaint.

Prior to each planned promotion, it is respondent's practice to send solicitory letters to a selected group of its suppliers whose products are deemed appropriate for the sale. The letter extends an offer of an "opportunity to participate" and refers to an attachment which lists the

costs of "participation". If a supplier agrees to the solicitation, its goods are advertised and specially promoted by the respondent to the extent of the payment made by the supplier.[2] The monies requested were in addition to any which may have been received pursuant to a supplier's standard cooperative advertising program.

Respondent's solicitations of its suppliers have been marked with substantial success, as the following tabulation indicates:

1958

Promotion	Approximate No. Solicited	Participated	Amount
57th AS	350	90	$23,538.37
20th TLPS	325	40	15,744.52
12th HCBS	170	71	7,955.10
9th AMHBC	37	21	17,939.86

1959

58th AS	300	75	$21,974.90
21st TLPS	275	45	12,271.93
13th HCBS	250	42	3,600.00
10th AMHBC	37	21	20,791.45

There is no longer any question that the Federal Trade Commission Act is violated by the knowing inducement and receipt of a promotional allowance which is discriminatory in that its grantor did not affirmatively offer it on proportionately equal terms to persons competing with the recipient of the allowance in the distribution of the

[2] The complaint charges that respondent did not utilize all of the money received from its suppliers to pay for advertising the suppliers' goods but devoted substantial amounts of such payments "to its own use". The hearing examiner dismissed this count, holding: "The record herein does not establish that payments received by the respondent were in excess of the value of the services rendered by it." Complaint counsel has not appealed this dismissal and at this juncture the Commission will not decide upon its correctness.

grantor's goods (*Giant, Inc.* v. *Federal Trade Commission*, supra). The basic factual elements of the violation are:

1. The solicitation and receipt by respondent in commerce of payments for promotional services in connection with the resale of a supplier's product.

2. That at approximately the time of the solicitation and receipt, other customers of the supplier were competing with the recipient in the distribution of the grantor-supplier's goods of like grade and quality.

3. The payments received by respondent were not affirmatively offered by the suppliers to such competing customers on proportionally equal terms.

4. That respondent possessed information sufficient to put upon it the duty of making inquiry to ascertain whether the granting suppliers were making such payments available to its competitors on proportionally equal terms.

Respondent does not question that the record contains substantial and adequate proof of the first element.

Proof sufficient to establish the second criteria should not be difficult to adduce, since it involves merely a showing of the exact identity of the products purchased by the respondent from a supplier who granted it an allegedly discriminatory promotional allowance and the same showing for any of respondent's competitors who did not receive the allowance. Yet respondent contends that this meager showing was not made in this record and, upon review of all of the evidence, we must conclude that it is right.

To prove this element of the case, complaint counsel relies upon the testimony of ten witnesses who were employees or officers of retailers or wholesalers distributing goods in one or more of the trade areas served by respondent. These witnesses were probably in command of the facts needed to satisfy this criteria but the examination

by counsel failed to elicit them. Perhaps a few examples will illustrate the defects in the evidence.

A witness named Jack Oltman testified that he was the manager of Marine Drug Store, Inc., located at 6602 Canal Street, in Houston, Texas. This store owns another pharmacy located at 209 Milby Street, in Houston. Marine Drug Store, Inc., is presumably a corporation but the witness' position, if any, with respect to the corporation and the other store was not explored. The witness was then asked whether "he" purchased the products of Max Factor & Co. and Shulton, Inc.,[3] during 1958 and 1959. He responded in the affirmative and stated the dollar amounts of purchases made from each company during each of the two years. The only specific product identified in the testimony as purchased from the two suppliers is Shulton's "Desert Flower Creme Deodorant". This, then, is the only product which we know that both Weingarten and the witness purchased and resold in 1958 and 1959. We have no idea how extensive the witness' purchases of this item were; whether it was stocked in both stores; and whether it was stocked and resold at or during the time when the respondent was soliciting and receiving the allegedly discriminatory allowance from Shulton.

Another witness relied upon is Oliver Thomas Cochrane. This witness was affiliated in some unknown manner with two pharmacies located in Houston. The record does not reveal whether he was an owner, official or employee, nor does it give any indication from which it can be concluded

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[3] These are two suppliers alleged in other Commission proceedings to have granted discriminatory promotional allowances to the respondent. Commission complaints issued charging these two cosmetic companies with violating Section 2(d) in granting promotional allowances to Weingarten. Neither of these 2(d) matters has been finally resolved. The *Max Factor* case (Docket 7717) is still pending before the hearing examiner. The *Shulton* matter (Docket 7721) is currently involved in litigation before the United States Court of Appeals for the Seventh Circuit.

that he was the properly qualified person to testify with respect to the operations of the two pharmacies with which he was affiliated.

Four officials of three grocery chains competing with Weingarten were called as witnesses for the complaint. The record clearly establishes that certain specific stores operated by these competing chains were located in sufficiently close proximity to Weingarten stores that competition between them is a certainty. The record also establishes that these chains purchased specified items from suppliers who participated in one or more of the Weingarten promotions in 1958 and 1959. With one exception, the record shows that these competing chains were not offered allowances proportionally equal to those given to Weingarten. But not all of the stores of any of these chains are in competition with Weingarten and there is no showing in this record that the stores shown to compete with Weingarten were actually stocking and selling an allegedly discriminating supplier's goods at approximately the time when Weingarten induced and received its promotional allowances. There is some evidence in the record from which it can be concluded that certain of the chains definitely do not stock and sell all items in all stores. For example, one of the A & P officials testified that Shreveport Macaroni products are carried in the A & P Shreveport stores but not in all of the other stores. The same witness testified that all of the A & P stores carried Carnation products but he was not asked to identify the specific type of products carried. This witness also stated that he could not testify as a fact that any particular A & P store handled and sold any given item at any of the times pertinent to this inquiry.

Counsel called to the stand three witnesses who were officials of food wholesaling concerns which conducted a substantial part of their business with voluntary groups of cooperating retailers. These cooperative groups were

composed of small retailers who trade under the same name and purchase the bulk of their supplies from the wholesalers who testified. Complaint counsel urges that we should consider these groups of retail grocers, together with their sponsoring wholesalers, as a competitive unit and hence in competition with Weingarten in the distribution of goods. Doubtless the record does show that the retailers utilize the services of the wholesaler for a wide variety of functions, including advertising, warehousing and financing. But opposed to this evidence is the showing that the proprietors of the retail stores are free to buy from any source they choose and are free to carry or reject any item which the sponsoring wholesaler carries. One witness testified that it was quite possible that as many as half of the stores sponsored by his organization might not carry any particular item. Moreover, the wholesalers conduct a substantial amount of business with retailers who are not members of a group and there is no showing as to the group's portion of the wholesalers' purchases from the allegedly discriminating suppliers. While the Commission is sympathetic to the proposition that voluntary cooperative retail groups of the type here involved are entitled to the protection of the Act, we are faced in this instance with a dearth of factual information upon which to predicate a finding that the sponsoring wholesalers and their affiliate groups were, or were not, "customers" of their suppliers. Minimally we must know whether suppliers considered them as a unit and paid promotional allowances to them as a unit. There should also be a more detailed showing as to the operations of the groups, particularly with respect to their dependence upon the participating wholesalers.

We do not view the question of whether a wholesaler and his sponsored cooperative group of retailers can be considered as a customer within the meaning of Section 2(d) of the Robinson-Patman Act or within the ambit of the violations spelled out in this proceeding as firmly decided. It is true that we have heretofore refrained from an affirma-

tive finding on this point,[4] but then, as now, the holding is predicated upon the facts and not upon the law.

The wholesaler testimony adduced in this record is defective in another respect in that it fails to identify the particular stores serviced which are in competition with Weingarten or, in the instance where stores are shown to compete, there is no showing that these stores handled and sold items similar in grade and quality to those purchased by Weingarten from suppliers who granted it an allegedly discriminatory promotional allowance.

There is a good deal more which could be said concerning the evidence adduced to support the element of competition between Weingarten and others in the distribution of items purchased from suppliers who gave Weingarten an allegedly discriminatory promotional allowance, but it is felt that the above brief outline of the principal deficiencies found in this evidence should suffice to inform the parties and the hearing examiner of the Commission's feeling with respect thereto. Antitrust cases and, in particular, Robinson-Patman cases require a meticulous attention to minute details. When dealing with prices, allowances and goods of like grade and quality, the Commission may not indulge in assumptions or presumptions, for these matters are susceptible of exact proof and this is the type of showing which must be made. The evidence adduced in this record in support of the element under consideration is, of course, not totally lacking in probative value, for a good deal of reliable and important information was secured from the ten "competitor" witnesses. But the evidence does not quite reach the level of reliability and substantiality necessary for a concrete finding on this particular point.

We turn now to a consideration of the third element necessary to prove the violations charged, that payments

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[4] E.g., Giant Foods, Inc., Docket No. 6459, page 3 of the slip opinion.

proportionally equal to those received by the respondent were not affirmatively offered by its suppliers to customers competing with respondent. While each of the ten "competitor" witnesses testified that they were not offered a proportional promotional allowance by the suppliers who participated in the Weingarten promotion, this evidence has little significance until it is definitely determined that the ten witnesses' companies actually competed with Weingarten in the distribution of the same suppliers' goods of like grade and quality. Thus a definitive finding on this point must await resolution of the prior factual question. The Commission concludes that the same reasoning applies to criteria number four, that of knowledge on the part of Weingarten that the payments made to it were discriminatory.

The remand of a case to the hearing examiner for further proceedings is never lightly ordered, but it is the Commission's decision that remand is the only possible course in these premises. This matter has now been in litigation for slightly more than three years and both the public and the respondent have incurred substantial expense in its trial. As we stated earlier, this case is attended with a great deal of public interest and to now order dismissal for failure of proof without finally deciding the legality or illegality of the respondent's acts would waste all of the money and effort heretofore expended. This would be a disservice both to the respondent and to the public and cannot be seriously contemplated. There is no question but that the public interest cannot be permitted to suffer because of the mistakes of Commission personnel.[5]

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[5] "It must not be forgotten that the Commission is not a private party, but a body charged with the protection of the public interest; and it is unthinkable that the public interest should be allowed to suffer as a result of inadvertence or mistake on the part of the Commission or its counsel where this can be avoided." *P. Lorillard Co.* v. *Federal Trade Commission*, 186 F. 2d 52, 55 (4th Cir. 1950).

This remand does not envision a complete retrial of all of the issues involved in this proceeding. Only evidence pertaining to the questions which this opinion points out cannot be decided upon the present record because of insufficient facts should be received. It is not contemplated that more than five full hearing days for each side will be needed to adequately shore up this record although the Commisison sees no need to actually order a limitation on the length of the hearings. However, the Commission does feel that this matter should be concluded with dispatch and will order that the hearing examiner and the parties make every effort to complete the reception of evidence within 90 days.

The deficiencies in this record are not entirely the fault of complaint counsel, for even if the record did contain a complete exposition of all the facts which the Commission needs to arrive at a final decision, this matter would still have to be remanded to the hearing examiner for the preparation of a new initial decision. Both the Administrative Procedure Act and the Commission's Rules require that initial decisions must state the reasons or basis for findings and conclusions upon all material issues of fact, law or discretion presented on the record.[6] The initial decision filed in this matter does not conform to this requirement.

A primary function of an initial decision is to make factual findings based upon the evidence of record. An initial decision which disposes of hundreds of pages of testimony and documentary evidence with a single conclusionary sentence or paragraph is not an adequate initial decision. It does not apprise the parties, the Commission or the public of the disposition which was made of the welter of conflicting contentions made by the two parties.

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[6] Administrative Procedure Act, Section 8(b) (15 U.S.C. § 1007(b)); Federal Trade Commission Rules of Practice, § 4.19(b) (June 1962).

Such a decision forces the reader to guess at what evidence was relied upon and what evidence was rejected. In this initial decision, the testimony of the ten "competitor" witnesses was disposed of with the following sentence:

> "Ten witnesses from nine companies competing with the respondent testified with regard to the allowances, if any, received from the eight suppliers heretofore specifically named and their testimony established that the said suppliers did not offer or otherwise make available payments or allowances for advertising or other services or facilities, on terms proportionately equal to those granted by them to respondent to all others of their customers who were competing with respondent in the sale and distribution of their products." (Footnote omitted.)

The quoted sentence is not a factual finding but a factual conclusion of the type which could be made by a high appellate court. Insofar as the facts are concerned, the hearing examiner's position is similar to that of a trial judge. His conclusions must be based upon facts and his decision must point out the facts upon which he relies. Of course this does not mean that an initial decision must delve into and deal at length with all of the conflicting factual evidence adduced in the record or it would approach in length the record itself. All that is required is that the basic factual evidence necessary to an informed decision be pointed out and described. A mere conclusion that the record contains such facts will not do. The Commission's responsibility, and hence the hearing examiner's, with respect to findings of fact was prescribed by the Supreme Court in *Automatic Canteen Co.* v. *Federal Trade Commission* (346 U.S. 61, 81 (1953)), as follows:

> ". . . While this Court ought scrupulously to abstain from requiring of the Commission particularization in its findings so exacting as to make this Court

> in effect a court of review on the facts, it is no less important, since we are charged with the duty of reviewing the correctness of the standards which the Commission applies and the essential fairness of the mode by which it reaches its conclusions, that the Commission do not shelter behind uncritical generalities or such looseness of expression as to make is [sic "it"] essentially impossible for us to determine what really lay behind the conclusions which we are to review."

Thus, at the conclusion of the hearings to be held pursuant to the accompanying order of remand, the hearing examiner is directed to prepare a new initial decision in accordance with the Commission's views here expressed.

One final point requires comment in this opinion. The respondent charges that the order to cease and desist proposed by the hearing examiner is unlawfully vague and broad in scope. Of course, we cannot predict at this stage what the hearing examiner's decision will be and thus the remarks we make here are only appropriate in the event that upon completion of the remand hearings he is still of the view that an order to cease and desist should issue. In such event, the Commission feels that the hearing examiner should examine the evidence adduced in the light of the recent court decisions, including the above-cited *Grand Union Co.* v. *Federal Trade Commission* and *American News Company, et al.* v. *Federal Trade Commission.* In particular, the statements of Judge Clark in the *American News* opinion to the effect that inducement standing alone has never been held to violate Section 5 and that inducement without concomitant receipt of a discriminatory allowance should not be enjoined without some showing as to its necessity.[7] At this juncture, the Commission voices no opinion as to whether this record will

[7] 300 F. 2d at 111.

support a conclusion that inducement without receipt should be enjoined. We are merely pointing out that the courts have refused to affirm orders with prohibitions of this nature and are asking the hearing examiner to consider this factor in his next initial decision.

An appropriate order remanding this case to the hearing examiner for further proceedings in conformity with the Commission's views expressed above will issue.

Commissioners Anderson and Elman, without joining in this opinion, agree that the matter should be remanded to the hearing examiner for the taking of further evidence, and should be promptly disposed of on remand. Commissioner Higginbotham did not participate in the decision of this matter.

March 25, 1963

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Commissioners:

Paul Rand Dixon, Chairman
Sigurd Anderson
Philip Elman
Everette MacIntyre
A. Leon Higginbotham, Jr.

Docket No. 7714

In the Matter of

J. WEINGARTEN, INC., a corporation.

Order Dismissing Complaint Without Prejudice

This proceeding was commenced by the issuance of a complaint on January 5, 1960, charging that the respondent retail grocery corporation had violated Section 5 of the Federal Trade Commission Act by knowingly inducing or

receiving discriminatory promotional allowances from its suppliers. Adjudicative hearings were held before a hearing examiner who, on May 3, 1962, entered an initial decision finding the allegations of the complaint to have been substantially proven and ordering respondent to cease and desist from prescribed activities.

Respondent appealed to the Commission, pleading that the findings and conclusion of the examiner were not supported by reliable, probative and substantial evidence and that the initial decision does not comply with the requirements of Section 8(b) of the Administrative Procedure Act in that it fails to make factual findings to support its general conclusions. The matter was considered by the Commission on the briefs of the parties and on oral argument heard October 23, 1962. On March 25, 1963, the Commission issued an order vacating the initial decision and remanding the matter to the hearing examiner for the expeditious reception of additional evidence. Two of the four commissioners participating in the decision of the appeal announced their reasons for the remand in an opinion accompanying the order.

On April 29, 1963, respondent filed a complaint against the Commission in the United States District Court for the Eastern District of Texas, Beaumont Division,* seeking a declaratory judgment and injunctive relief barring the Commission from any further action in the instant proceeding other than dismissal and, on May 10, 1963, filed an amendment to the complaint seeking, after final hearing, an order in the nature of a writ of mandamus requiring dismissal of the administrative complaint. On July 11, 1963, the District Court entered an Order, together with Findings of Fact and Conclusions of Law, requiring *inter alia* as follows:

> "a. Defendants, their agents, employees and attorneys and all persons in active concert and participa-

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* *J. Weingarten, Inc.* v. *The Federal Trade Commission, et al.*, Civil Action No. 4754.

tion with them be and they hereby are restrained and enjoined from remanding the case of J. Weingarten, Inc., FTC Docket No. 7714, to said Hearing Examiner or other hearing officer or from holding any hearings or other proceedings or from taking any further action of any kind, directly or indirectly, under and by virtue of said order and opinion of remand.

"b. Within ninety (90) days from May 15, 1963, defendant Federal Trade Commission and defendants Dixon, Anderson, Elman, MacIntyre and Higginbotham make and issue a final order, disposing of said case before the Federal Trade Commission."

On July 16, 1963, the District Court denied the Commission's motion for a stay pending appeal. On July 24, 1963, a notice of appeal was filed in the District Court. On or about July 26, 1963, motions for a stay of the District Court order pending appeal and for expedition of the appeal in the United States Court of Appeals for the Fifth Circuit were filed. The Court has not rendered a decision on these motions.

Under the circumstances, and solely for the purpose of complying with the above-noted order of the District Court.

IT IS ORDERED that the Commission's complaint in this proceeding be, and it hereby is, dismissed without prejudice to the right of the Commission to reopen the matter and take such further action therein as the public interest may require if the aforesaid order of the District Court becomes ineffective as a matter of law.

By the Commission.

(SEAL)

JOSEPH N. KUZEW
Joseph N. Kuzew,
Acting Secretary.

ISSUED: August 13, 1963.

APPENDIX B

Statutes Involved

(1) Section 5 of the Federal Trade Commission Act (66 Stat. 632; 72 Stat. 942-943; 15 U.S.C. § 45):

> (a)(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.
>
> • • • •

(2) Section 2(d) of the Clayton Act, as amended (49 Stat. 1527; 15 U.S.C. § 13(d)):

> That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

(3) Section 5(c) of the Administrative Procedure Act, (60 Stat. 240; 5 U.S.C. § 1004(c)):

> (c) The same officers who preside at the reception of evidence pursuant to section 1006 of this title shall make the recommended decision or initial decision required by section 1007 of this title except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to partici-

pate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 1007 of this title except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency.

(4) Section 6(a) of the Administrative Procedure Act, (60 Stat. 240; 5 U.S.C. § 1005(a)):

> * * * Every agency shall proceed with reasonable dispatch to conclude any matter presented to it except that due regard shall be had for the convenience and necessity of the parties or their representatives. * * *

(5) Section 7(a) and (b) of the Administrative Procedure Act, (60 Stat. 240; 5 U.S.C. § 1006):

> (a) There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this chapter; but nothing in this chapter shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute. The functions of all presiding officers and of officers participating in decisions in conformity with section 1007 of this title shall be conducted in an impartial

manner. Any such officer may at any time withdraw if he deems himself disqualified; and upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case.

(b) Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpoenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section 1007 of this title, and (9) take any other action authorized by agency rule consistent with this chapter.

(6) Section 12 of the Administrative Procedure Act, (60 Stat. 240; 5 U.S.C. § 1011):

. . . all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons.

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CITATIONS

Statutes:	
Administrative Procedure Act, Section 6(a), 60 Stat. 240, 5 U.S.C. 1005(a)	2
Clayton Act, Section 2(d), 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13(d)	2, 3
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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 736

J. WEINGARTEN, INC., PETITIONER

v.

THE FEDERAL TRADE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1–18)[1] is reported at 336 F. 2d 687. The oral opinion and decision of the district court appears at Pet. App. 19–28, and the district court's written findings of fact and conclusions of law appear at Pet. App. 29–44.

[1] "Pet. App." refers to appendices A and B attached to the petition for a writ of certiorari herein, bearing consecutive page numbers followed by the letter "a" (which letter we omit in citations to these appendices).

"R." refers to the record certified by the district court to the court of appeals.

JURISDICTION

The judgment of the court of appeals (Pet. App. 19) was entered on September 14, 1964. The petition for a writ of certiorari was filed on December 3, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was factual basis for the district court's finding that there had been unjustified delay in the Federal Trade Commission's conduct of its proceeding against petitioner.

2. Whether the Commission's order remanding the proceeding to the hearing examiner manifested prejudice against the petitioner.

3. Whether the Commission's order dismissing its proceedings subject to reopening if the district court's injunction order was reversed rendered moot the Commission's appeal from such order.

STATUTES INVOLVED

The pertinent portions of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45); of Section 2(d) of the Clayton Act, 15 U.S.C. 13(d)); and of Section 6(a) of the Administrative Procedure Act, 5 U.S.C. 1005(a), are set forth in Appendix B to the petition.

STATEMENT

Petitioner seeks review of the judgment of the court of appeals (Pet. App. 19) reversing an order of the District Court for the Eastern District of Texas. The district court found that the Federal Trade Commis-

sion had failed to proceed with reasonable dispatch in its administrative proceedings against petitioner. It enjoined the Commission from remanding the proceedings for further hearings before the examiner and directed that within 30 days the agency should "make and issue a final order, disposing of said case" (Pet. App. 25, 45–46).

The Federal Trade Commission proceeding. On January 5, 1960, the Commission issued a complaint charging petitioner, *inter alia,* with receiving unlawful promotional allowances in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and Section 2(d) of the Robinson-Patman Act, 15 U.S.C. 13 (R. 46–49). Concurrently, eight proceedings were instituted against the principal suppliers alleged to have furnished the discriminatory allowances. The nine cases were assigned to the same hearing examiner (R. 59).

Hearings began on March 17, 1960. An interlocutory appeal to the Commission was taken by petitioner on May 23, 1960, and disposed of on September 9, 1960. Hearings were terminated on February 27, 1961, and were followed by the filing of proposed findings and briefs. During the time that the case was pending before the examiner, petitioner made no complaint of undue delay and did not request that the proceeding be expedited. The hearing examiner issued his initial decision on May 1, 1962, concluding that the violations charged had been established (R. 50–73).

After both parties had obtained extensions of time for filing briefs, oral argument was held before the

Commission on October 23, 1962. Five months later, on March 25, 1963, the Commission remanded the case to the hearing examiner for prompt taking of limited further evidence (Pet. App. 47–62).[2] The Commission stated that, while the solicitation and receipt of discriminatory promotional allowances by petitioner had been established (Pet. App. 52–53, 57–58), it wanted additional detail concerning the firms that competed with petitioner in selling goods of like grade. It noted that the record already contained "reliable and important information" on this issue but that this evidence was not sufficient due to the failure to elicit all the available data from the ten witnesses who testified for the distributors of goods in the area (Pet. App. 53–55, 57–58). The remand was ordered for the taking of this additional evidence and to enable the examiner to make more detailed findings of fact (Pet. App. 59–61). The Commission stated that since the remand was not for a retrial but for the taking of the limited additional evidence, it should require no more than five additional hearing days for each side, and directed that every effort be made to complete the reception of evidence within ninety days (Pet. App. 47).

On April 3, 1963, the examiner set the pre-hearing conference for April 16, 1963 (R. 74), on which date petitioner's counsel met with the examiner and com-

[2] By March 25, 1963 the Commission had already entered cease-and-desist orders in five of the proceedings against the suppliers (R. 58).

plaint counsel, and the examiner set dates of May 3 and May 17, 1963, for the trial briefs and set a further pre-hearing conference for May 21, 1963 (R. 76). No protest was entered by petitioner. On April 26, 1963, complaint counsel moved for the extension of the date for his trial brief to June 6, 1963, and for the elimination of the further pre-hearing conference (R. 77). Petitioner, on April 29, 1963, concurred in the extension of time requested, but objected to the elimination of the second pre-hearing conference (R. 78–79). On the same date, petitioner filed its complaint in the district court.[3]

Decision of the district court. Following oral argument and the receipt in evidence of petitioner's documentary exhibits, the district court on July 11, 1963, acting upon petitioner's "motion for injunction" *pendente lite,* found that the Commission's opinion evidenced some prejudice against the petitioner (Pet. App. 33), that there was little reason to think that additional evidence would be available to Commission counsel (Pet. App. 37–40), and that the Commission could itself hear whatever additional evidence there was without the delays of a hearing before the exam-

[3] The examiner did not grant the full time requested; he continued the time for trial briefs only to May 17 and 31, respectively, but granted petitioner's request for the retention of the further prehearing conference, which was set for June 4, 1963 (R. 80). However, on May 17, 1963, the examiner, by reason of the district court proceedings, revoked the order setting the above dates and did not continue with the remanded hearing.

iner (Pet. App. 35, 41). It concluded that the order to remand was "merely a vehicle to violate the provisions in Section 6(a) of the Administrative Procedure Act requiring reasonable dispatch" (Pet. App. 43a) and enjoined the remand, directing the Commission to enter a final order by August 13, 1963 (Pet. App. 45–46).

Pending appeal of the district court order, on August 13, 1963, the Commission issued an "Order Dismissing Complaint Without Prejudice * * * to the right of the Commission to reopen the matter and take such further action therein as the public interest may require if the aforesaid order of the District Court becomes ineffective as a matter of law." (Pet. App. 64.)

Decision of the court of appeals. The court of appeals reversed the judgment of the district court, with instructions to dissolve the injunction (Pet. App. 18). The court noted that the district court had acted in the absence of proof of the normal time necessary to conduct a similar administrative proceeding or of facts tending to show a dilatory attitude (Pet. App. 7). It rejected petitioner's contention that the Commission's conceded power to remand for the taking of additional evidence (Pet. App. 8) had been employed for the purpose of implementing an alleged prejudgment of petitioner's actions. With respect to the district court's prohibition of the use of an examiner to take whatever additional evidence was needed, the court of appeals held that there was "simply no basis for the District Judge taking it on himself to tell the Com-

mission how it should husband and deploy its resources and manpower" (Pet. App. 17).[4]

ARGUMENT

The decision of the court of appeals involves a factual issue relating only to one particular proceeding before the Federal Trade Commission.[5] The issue has been reviewed carefully and decided correctly by the court of appeals and does not merit review by this Court.

1. The court below correctly rejected petitioner's contention that the Commission did not proceed with sufficient dispatch, for nothing in petitioner's complaint or the record shows that any part of the period prior to the issuance of the remand order represented undue delay (R. 2–26). Indeed, petitioner was foreclosed from belatedly challenging the time that transpired in light of petitioner's own contributions to the delay and its failure to make seasonable protest by means of the available administrative remedies.

It is undisputed that the usual steps and procedures were followed, up to the time of the initial decision of the examiner. See Statement, *supra*, p. 3. During the period of less than six months after the hear-

[4] Petitioner's argument that the matter had become moot because of an order of the Commission entered on August 13, 1963, was similarly rejected by the court of appeals on the ground that the terms of the order itself showed the conditional nature of the dismissal. (Pet. App. 18, fn. 27; 64).

[5] We put to one side, for present purposes, the question whether a district court may in any circumstances intervene in an agency proceeding on the ground that it is not being conducted with dispatch.

ing examiner's initial decision, both petitioner and complaint counsel sought and obtained reasonable extensions of time to file briefs on appeal, briefs were filed, and the matter was heard with reasonable promptness by the Commission. The five months and two days interval between the argument and decision was not an unreasonable period for the Commission to take to study the record.

No more meritorious is the district court's suggestion that the Commission itself—presumably sitting en banc and hearing testimony of witnesses—could have adduced the additional evidence that it desired (Pet. App. 43). The Commission cannot reasonably be asked to set aside all other matters and for ten days conduct hearings of a type properly assigned to hearing examiners. Clearly this is a matter for the Commission's discretion, and the court of appeals aptly characterized the district court's suggestion as follows (Pet. App. 16–17a):

> Actually the District Judge, by permitting the Commission itself to take action within 30 days, recognized that it was proper for the Commission to obtain additional or clarifying evidence. But this prohibition on the use of an Examiner is an unwarranted intrusion into the administrative process by a Judge. * * * Congress recognizes that in administrative adjudication much must be left to hearing officers. * * * With the wide range of its statutory responsibilities, the number and complexities of

> the kind of matters it must handle [footnote omitted], there is simply no basis for the District Judge taking it on himself to tell the Commission how it should husband and deploy its resources and manpower.

2. The court of appeals' opinion demonstrates the insubstantiality of the charge that the Commission had prejudged the case against petitioner (Pet. App. 14–18).

As the court stated (Pet. App. 17–18):

> This is not a case like *Accardi* [*United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260] where the authority having the ultimate decision dictated the result to the body charged with the initial decision. Neither is it a case like *Amos Treat* [*Amos Treat & Co.* v. *S.E.C.*, 306 F. 2d 260 (C.A.D.C)] where one who actively engaged in the prosecution of a case at its initial stages became a judge of guilt or innocence at a later state. There is here no direction to convict—no intimation as to how the initial decision should be made. * * *

The court of appeals properly pointed out that neither the fact of remand itself nor the reasons given by the Commission for the remand showed prejudice, since (Pet. App. 15–16):

> [The courts] frequently remand both criminal and civil cases for a full or partial retrial. Such situations are, in effect, a holding that while the evidence was legally deficient, nevertheless

> the record indicates that more or better evidence is available on a new or further trial and a system of justice dedicated to the objective of finding the truth ought not to balk at affording an opportunity of "shoring up" the case.

3. Petitioner's contention that the case was rendered moot by the Commission's order of August 13, 1963, is without merit. The order was no unconditional closing of the matter but a dismissal of the proceeding "without prejudice to the right of the Commission to reopen the matter and take such further action therein as the public interest may require if the aforesaid [injunction] order of the District Court becomes ineffective as a matter of law" (Pet. App. 64). Upon the dissolution of the injunction the Commission became free to reopen and continue the proceedings.* As the court of appeals observed (Pet. App. 18, n. 27), "The conditional nature of the Commission's dismissal of the proceedings makes inapposite the authorities cited by [petitioner] in support of the contention that the matter is now moot."

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* When the Commission sought a stay of the district court order, pending the Commission's appeal thereof, it argued the possibility of mootness if the stay were not granted. But when the argument was not accepted, the Commission re-examined the alternatives and employed a different step—a conditional dismissal—which had not been considered in the argument concerning a stay.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
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JANUARY 1965.

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